Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

QUESTIONS PRESENTED

This case involves a determination of first impression whether the Secretary of Energy, exercising transferred functions of the former Federal Power Commission (FPC) under the Department of Energy Organization Act of 1977, Sections 301, 302, 402, 501 and 641, 42 U.S.C. 7151(b), 7152, 7172(a)(2), 7191, 7251, is relieved of the restrictive language of the Flood Control Act of 1944, Section 5, 16 U.S.C. 825s, which in relevant part reads "rate schedules to become effective upon confirmation and approval". If the Secretary is relieved of such restrictive language, traditional final agency action before federal hydropower rate schedules are made effective will be eliminated thereby enabling the Government to make effective one or successive pre-final rates free from judicial review over long periods pending final agency action. If such restrictive language is not eliminated, final agency confirmation and approval action will continue to be required before rates become effective thereby both restricting implementation of such pre-final rates pending confirmation and approval and requiring implementation of only judicially reviewable rates for federal agency sales of Flood Control Act hydropower.

The following question are presented:

1. Whether Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, prevents rates for federal hydroelectric power and energy from being made effective before confirmation and approval by final agency action, which was the traditional FPC practice from 1944 to 1977.

2. Whether Sections 301(b), 302(a), 402(a)(2), 501(a)(1) and 641 of the Department of Energy Organization Act of 1977, 42 U.S.C. 7151(b), 7152, 7172(a)(2), 7191 and 7251, amend the Flood Control Act, Section 5, to eliminate the rate implementation restriction "rate schedules to become effective upon confirmation and approval".

II

3. Whether the Government is bound by the commercial terms of its power sales agreement with Sam Rayburn, SWPA Contract No. 14-02-0001-1124 (Feb. 13, 1964), which track the language of the Flood Control Act, Section 5, and thereby prevent rate increases being made effective on a pre-final basis pending confirmation and approval by final agency action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sam Rayburn Dam Electric Cooperative, Inc., petitioner, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The judgments of the court of appeals in *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. 82-2564, and *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. 83-2341, consolidated (App. B, *infra*, A-3), are not reported. The courts of appeals' order denying Sam Rayburn Dam Electric Cooperative, Inc.'s (Sam Rayburn) petition for rehearing and its suggestion of *en banc* consideration on

rehearing (App. A, *infra*, A-1) is not reported. The April 25, 1983, second judgment of the district court (App. C, *infra*, A-5) is not reported. The order of the district court vacating its first judgment (App. D, *infra*, A-6) and noting disagreement with the court of appeals is not reported. The October 21, 1982, first judgment of the district court (App. E, *infra*, A-8) and supporting memorandum and order (App. F, *infra*, A-10) are not reported.

Jurisdiction

The judgment of the court of appeals in the *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.* consolidated cases was entered on July 27, 1983, and an order denying the petition for rehearing was entered on September 13, 1983. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1254(1).

Statutes Involved

Section 5 of the Flood Control Act of 1944, 58 Stat. 890, 16 U.S.C. 825s, provides in relevant part as follows:

> Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost

of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives.* * *

Sections 301, 302, 402, 501 and 641 of the Department of Energy Organization Act of 1977, 91 Stat. 577, 578, 583, 587, 598, 42 U.S.C. 7151, 7152, 7172, 7191 and 7251, provide in relevant part as follows:

Section 301(b)

Except as provided in title IV, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 402(a)(2) to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

Section 302(a)(1), (2)

(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 5 of the Flood Control Act of 1944, and all other functions of the Secretary of the Interior, and other officers and components of the Department of the Interior, with respect to—

* * *

(B) the Southwestern Power Administration;

* * *

(2) The Southeastern Power Administration, the Southwestern Power Administration, the Bonneville Power Administration, and the Alaska Power Administration shall be preserved as separate and

distinct organizational entities within the Department. Each such entity shall be headed by an Administrator appointed by the Secretary. The functions transferred to the Secretary in paragraphs . . ., 1(B), . . . shall be exercised by the Secretary, acting by and through such Administrators. * * *

Section 402(a)(2)

The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

(B) sections 8, 9, 13 through 17, 20 and 21 of the Natural Gas Act.

Section 501(a)(1)

* * * If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

Section 641

To the extent necessary or appropriate to perform any function transferred by this Act, the Secretary or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

Statement of the Case

This case presents important questions concerning the proper legal administrative standards governing federal agencies for federal hydropower rate implementations controlled by the Flood Control Act and the Department of Energy Organization Act (DOE Act), which are the object of conflicting claims by Sam Rayburn and the Government about the requirement of final agency action before a proposed rate may be made effective. In addition, an important question is presented as to the binding nature of the commercial terms of the Government's power sales contracts.

Background

There are no material issues of fact in dispute. The facts pertain to the traditional FPC collection of federal hydropower rates by making them effective upon confirmation and approval by final agency action and the change wrought by the Secretary of Energy after December 21, 1978, in making Flood Control Act rates effective pending such confirmation and approval. Thus, as charged by the Flood Control Act, Section 5, from 1944 to 1977 the FPC made rates effective through confirmation and approval by final agency action. As equally charged by Section 5, such rates were designed to recover costs of dam construction and operation. After December 21, 1978, to meet the cost recovery charge the Secretary of Energy purported to make proposed rates effective pending confirmation and approval by final agency action. But this ignored the equally binding charge, "rate schedules to become effective upon confirmation and approval". 16 U.S.C. 825s.

In 1977, Congress created the Department of Energy (DOE) in an effort to centralize energy policy. 42 U.S.C. 7111(4). This centralization of policy making does not touch upon the substantive rate implementation restriction traditionally met by the FPC, and contained in the Flood Control Act, Section 5; "rate schedules to become effective upon confirmation and approval". However, the DOE Act does reorganize the exercise of rate implementation functions

previously vested in the FPC. But, not all rate implementation power is passed to the Secretary of Energy by the DOE Act; only some FPC rate implementation functions are transferred to the Secretary (42 U.S.C. 7151(b)) while others are transferred to the Federal Energy Regulatory Commission (FERC) (42 U.S.C. 7171, 7172(a)). Among the FPC functions transferred to the Secretary is rate implementation under the Flood Control Act, Section 5. Also transferred to the Secretary is the rate design function of Section 5 previously exercised by the Secretary of the Interior (42 U.S.C. 7152). But rate design is directed to be exercised by the Secretary through the Administrators of the five regional Power Marketing Agencies (PMA's) (42 U.S.C. 7152(a)(2)) thereby maintaining exercise of the Section 5 rate design function apart from the rate confirmation and approval function which the Secretary could exercise directly.

The FPC confirmation and approval function under the Flood Control Act, Section 5, is specifically restricted in its rate implementation aspect to making rates effective upon final agency action: "rate schedules to become effective upon confirmation and approval". 16 U.S.C. 825s. In contrast, FPC rate implementation under the Federal Power Act of 1935, Section 205, 16 U.S.C. 824d, and the Natural Gas Act of 1938, Section 4, 15 U.S.C. 717c, includes authority to place rates in effect before final agency action. But the Flood Control Act regulates rate development and implementation for sales of federal hydropower by federal agencies, while the Federal Power and Natural Gas Acts govern investor-owned utilities and encounter substantially different regulatory considerations as evidenced by Congress' divergent approach.

Among several other statutes governing sales of federal hydropower by PMA's,[1] the FPC was restricted to making

[1] The actual sale of Flood Control Act federal hydropower before 1977 was the responsibility of the Secretary of the Interior under Section 5. Such sales were delegated to the PMA's which were continued under the DOE Act, Section 302, 42 U.S.C. 7152, including the Southwestern Power Administration (SWPA) whose isolated rate for Sam Rayburn Dam is at issue here for a 19-month period (June 1, 1979 - January 7, 1981).

rates effective only upon confirmation and approval.[2] Rulemaking to set proposed rates under these statutes, as well as under the Flood Control Act, encountered a lengthy independent confirmation and approval process by the FPC which delayed speedy implementation of rates designed to meet the other statutory requirements for cost recovery. Aware of the delay situation with the FPC, in 1977 the DOE misread the DOE Act as continuing the review of proposed rates by an "independent" body, which led the Secretary of Energy to issue Delegation Order No. 0204-33[3] passing final agency confirmation and approval authority (formerly exercised by the FPC) to the FERC, thereby perpetuating the delay sequence.[4] The Delegation Order was based on an internal DOE memorandum produced when DOE staff attorneys tackled the delay problem and reached the result-oriented conclusion that authority to make rates effective pending final agency action was inherent in all rate implementation power.[5] As a result, while final "independent" agency confirmation and approval authority was delegated to the FERC, the Assistant Secretary for Resource Applications (AS/RA) was delegated authority to place proposed federal hydropower rates in effect pending FERC final confirmation and approval. The fundamental legal problems with such delegation of bifurcated rate implementation authority under the Delegation Order are (1)

[2] FPC rate implementation is limited to making rates effective upon confirmation and approval under the Bonneville Power Act of 1937, Section 6, 16 U.S.C. 832e, and the Columbia River Transmission System Act of 1974, Section 9, 16 U.S.C. 838g. Unlimited federal agency rate implementation authority without the FPC review appears, in contrast, in the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485h(c).

[3] 43 Fed. Reg. 60636-60637 (Dec. 31, 1978).

[4] In fact such delegation was unnecessary because "independent" review had been preserved by Congress under the DOE Act through transferring exercise of the FPC confirmation and approval function to the Secretary while transferring exercise of the rate design function to the PMA Administrators. 42 U.S.C. 7151(b), 7152(a).

[5] Memorandum from L.R. Coleman, General Counsel, to J.R. Schlesinger, Secretary of Energy (Oct. 14, 1978). Record, SRDEC Appendices at H.

that the Secretary has no authority to implement rates other than as set out in the particular power marketing statute being applied, and (2) that the Flood Control Act specifically restricts the FPC to making rates "effective upon confirmation and approval" (16 U.S.C. 825s) thereby preventing pre-final implementation by the AS/RA.

The Secretary's authority to issue a delegation order is not contested. Indeed only that part of Delegation Order No. 0204-33 is contested which purports to authorize making pre-final Flood Control Act rates effective. Thus, the purported authorization of pre-final rate implementation contained in the Delegation Order is in direct conflict with the restricting language of the Flood Control Act, Section 5, and some 33 years of FPC administrative practice. As a result the Flood Control Act requirement, "rate schedules to become effective upon confirmation and approval", was ignored by DOE's implementation of pre-final rate increases against Sam Rayburn on June 1, 1979, under the Delegation Order[6] pending final confirmation and approval. Notably such final confirmation and approval did not occur until January 8, 1981,[7] and in that interim Sam Rayburn refused to pay the rate increase as part of its rate payment.[8] The present litigation ensued.

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[6] DOE Order Confirming, Approving, and Placing Rates in Effect on an Interim Basis, 44 Fed. Reg. 24341 (Apr. 25, 1979).

The legal adequacy of the administrative procedure is not challenged; challenge is made only to the administrative action making proposed rates effective in defiance of the Flood Control Act, Section 5's clear statutory restriction against pre-final rate implementation, "rate schedules to become effective upon confirmation and approval".

[7] Order Confirming and Approving Long-Term Rates, issued in *SWPA*, FERC Docket No. EF79-4021 (Jan. 8, 1981).

[8] Sam Rayburn paid the pre-final rate from November 1, 1980, through January 7, 1981. Only the amount of the rate increase was not paid from June 1, 1979, through October 31, 1980. As of January 8, 1981, San Rayburn paid the full final rate. Moreover, Sam Rayburn supported an increase over that final rate and the FERC confirmed and approved a new final rate in *SWPA*, Docket No. 83-4021 (June 23, 1983). Sam Rayburn is now paying the new final rate.

Notably Sam Rayburn has also paid the principal and interest due on the district court final judgment of April 25, 1983. No economic benefit is accru-

The Decisions Below

The decisions below must be understood in the context of several almost simultaneous litigations involving the identical pre-final implementation and contractual issues. After inital implementation of pre-final rates by the Government in the Spring of 1979, two unsuccessful suits were brought by customers under the Bonneville Power Act of 1937, Section 6, 16 U.S.C. 832e.[9] *Montana Power Company* v. *Edwards*, 531 F. Supp. 8 (1981); and *Pacific Power and Light Company* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980). Both suits were decided by the same district court judge upon the erroneous determination that the administrative powers extended to the Secretary of Energy under the DOE Act, Section 402(a)(2), 42 U.S.C. 7172(a)(2), contained substantive pre-final rate implementation authority under the Natural Gas Act.[10] No appeals were taken. A third suit was brought by a customer against pre-final rates implemented under the Reclamation Project Act of 1939, Section 9(c), 43 U.S.C. 485h(c), wherein the district court upheld the pre-final rate implementation. *Colorado River Energy Distributors Ass'n* v. *Lewis*, 516 F. Supp. 926 (D.D.C. 1981). Notably, the FPC has no rate implementation function under the Reclamation Project Act's unrestricted general grant of rate implementation authority and there is no language therein requiring final agency confirmation and approval for rates to become effective. No appeal was taken.

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ing to Sam Rayburn through this litigation. Compare the insinuation in *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, 394 n.5 (1982), App. I, *infra*, A-78.

[9] The Bonneville Project Act (BPA), Section 6, served as the model for Flood Control Act, Section 5. Conference Report, H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944). The BPA Conference Report, H.R. Rep. No. 1507, 75th Cong., 1st Sess. (Aug. 12, 1937), makes no changes in the House Report which states clearly that rate schedules are subject to FPC confirmation and approval before being made effective. H.R. Rep. No. 1090, 75th Cong., 1st Sess. 3 (1937).

[10] This reasoning has been exploded. See note 14 *infra*.

At about this same time, the Government was successfully sued by another customer for illegal pre-final rate implementation under the Flood Control Act, Section 5. *Arkansas Power & Light Co.* v. *Schlesinger*, Civ. Act. No. 79-1263 (D.D.C. Oct. 20, 1980).[11] The Government lost that suit because language in its power sales contract prevented pre-final rate implementations against the customer. The statutory issue of Flood Control Act restrictions against pre-final rate implementation was not decided.

In addition, the Government brought three unsuccessful litigations against electric cooperatives in Texas and Louisiana to recover pre-final Flood Control Act rate increases which the cooperatives had refused to pay as illegally implemented. The instant litigation is one of those suits (jurisdiction under 28 U.S.C. 1331), and the three separate district courts independently determined (1) that the Flood Control Act, Section 5, requires final agency action before rates may be made effective, (2) that the DOE Act transfer of the FPC function under the Flood Control Act does not in any way remove the restriction on that function against pre-final rate implementation, and (3) that the Oregon district court is in error in regard to substantive rate implementation authority being granted through the extension of administrative powers under the DOE Act. *United States* v. *Tex-La Electric Cooperative, Inc.*, 524 F. Supp. 409 (E.D. La. 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982), App. G, *infra*, A-44; *United States* v. *Northeast Texas Electric Cooperative, Inc.*, Civ. Act. No. 81-604 (S.D. Texas Dec. 9, 1981), *rev'd* 693 F.2d 392 (5th Cir. 1982); and *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, Civ. Act. No. H-80-1781 (S.D. Texas Oct. 26, 1982), *revoked* (Order Feb. 15, 1983), (Apps D, E, *infra*, A-6, A-8).

While the district courts' actions in *Tex-La*, *Northeast* and *Sam Rayburn*, were pending, four municipal customers also

[11] Slip Op. contained in Sam Rayburn's Brief, Appendix H, (July 7, 1983), filed in the court of appeals in No. 83-2341.

successfully sued the Government in the Court of Claims for refund of pre-final rates collected in violation of the Flood Control Act, Section 5. *Cities of Fulton, Lamar, Thayer, Missouri, and Piggot, Arkansas* v. *United States*, 680 F.2d 115 (Ct. Cl. 1982) (App. H, *infra*, A-65).[12] Before the *Fulton* decision was issued summary judgment had been entered against the Government in *Tex-La* and *Northeast*. After *Fulton* was issued summary judgment was granted against the Government in *Sam Rayburn* (App. F, *infra*, A-10), but later the court of appeals consolidated the Government's appeals in *Tex-La* and *Northeast* and reversed those district courts. (Jurisdiction under 28 U.S.C. 1291.) *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982), (App. I, *infra*, A-78). Notably the court of appeals did not examine the ultimate issue of pre-final rate implementation, but erroneously stated that Tex-La conceded that issue. 693 F.2d 409. Tex-la and Northeast did not seek certiorari. Thereafter, upon motion by the Government the *Sam Rayburn* court revoked its October 26, 1982, judgment (App. D, *infra*, A-6) and issued a judgment in favor of the Government on April 25, 1983 (App. C, *infra*, A-5), but in doing so noted both its disagreement with the court of appeals, and that revocation was granted only because the district court must follow precedent. (App. D, *infra*, A-6). That is a strong statement from the district court below which indicates the importance of this case.

Sam Rayburn filed its notice of appeal on June 6, 1983, and the Government moved (1) to consolidate Sam Rayburn's appeal (*United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. 83-2341 (5th Cir.)), with an earlier appeal by the Government from the judgment of October 26, 1982, (*United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. 82-2564 (5th Cir.)), and (2) for summary disposition. Sam Rayburn filed an Opposition to the

[12] The Government has informed the Court of Claims that it reserves the right to seek certiorari from the *Fulton* decision. App. K, *infra*, A-119.

motion for summary judgment disposition together with its brief-in-chief on July 8, 1983. The Government's motion was granted on the grounds that the issues raised in *Tex-La* are identical with the issues raised in *Sam Rayburn* and that *en banc* consideration would be needed to reverse *Tex-La*. (App. B, *infra*, A-3). Sam Rayburn filed a Petition for Rehearing and a Suggestion of *En Banc* Consideration on Rehearing on August 10, 1983, noting therein that the *Tex-La* decision (1) erroneously stated that Tex-La had conceded the pre-final rate issue, and (2) erroneously determined that the DOE Act amends the Government's power sales contracts to eliminate language restricting pre-final rate implementation. Further, Sam Rayburn noted that *Tex-La* decides only an issue which was never in dispute before the *Tex-La* district court, nor is it in dispute in *Sam Rayburn;* whether the administrative procedure for review of proposed rates is adequate. The petition and suggestion were denied on September 13, 1983. (App. A, *infra*, A-1).

Sam Rayburn now files this petition for a writ of certiorari seeking judicial enforcement of the statutory requirements for Flood Control Act rate implementation by the DOE. If the court of appeals' decision is allowed to stand, it (1) will condone the judicial legislation effected by the *Tex-La* decision's rewriting of the Flood Control Act and DOE Acts and (2) will ratify the administrative and judicial legislation used by DOE as a statutory avoidance technique for the administrative convenience of federal agencies.

Reasons for Granting the Writ

I. The Court of Appeals' Decision Is In Direct Conflict With The Court of Claims' Decision In *Fulton* v. *United States*

The court of appeals' decision in *Sam Rayburn*, following *Tex-La*, is in direct conflict with the decision of the Court of Claims on the substantially indistinguishable statutory and contractual issues which were raised in *Fulton*, *supra*. Such conflict leaves the meaning of the DOE and Flood Control Acts restricting pre-final rate implementation in a state of confusion which will affect future cases.

A. *The Statutory Issues*

The statutory issues in *Sam Rayburn* and *Fulton* are identical: Whether the Government has illegally collected pre-final rates for sales of Flood Control Act, Section 5, hydropower. The first district court judgment in *Sam Rayburn* found that such pre-final rate collections are illegal. (Apps E, F, *infra*, A-8, A-22–A-23, A-38). The second *Sam Rayburn* district court judgment reversed this finding and was affirmed by the court of appeals following its decision in *Tex-La*, 693 F.2d 392 (5th Cir. 1982), (App. I, *infra*, A-3).[13] (App. C, *infra*, A-5). Thus the Court of Claims in *Fulton* is in conflict with the court of appeals in *Sam Rayburn* because it had earlier found against pre-final Flood Control Act rates for the following reasons: First, the Government's argument of an assumed power to place pre-final Flood Control Act rates into effect based on the DOE Act transfer of FPC functions failed because not all rate approval functions of the FPC were transferred to the Secretary of Energy to create a general power (some were transferred independently to the FERC). *Fulton*, 680 F.2d 118, (App. H, *infra*, A-70). Second, that argument failed because the Administrative powers extended to the Secretary to carry out the FPC functions (42 U.S.C. 7151(b), 7172(a)(2)) do not contain the rate approval powers of the Natural Gas and Federal Power Acts which include pre-final rate implementation authority but were transferred by the DOE Act to the FERC.[14] *Fulton*, 680 F.2d 118, (App. H, *infra*, A-70–A-71). Third, that argument failed because

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[13] Moreover the court of appeals plainly stated that Sam Rayburn "does not, and indeed cannot dispute the fact that the issues in the present appeal are controlled by *Tex-La*". App. B, *infra*, A-4.

[14] The *Pacific Power and Light* and *Montana Power Company* cases had found such administrative powers to contain substantive rate implementation authority but the reasoning of these Oregon decisions was rejected in *Fulton*, *Tex-La*, *Northeast* and *Sam Rayburn's* first district court judgment. Notably the court of appeals in *Tex-La* also rejected this argument. 693 F.2d 411. See Sections 501, 641, 42 U.S.C. 7191(a)(1), 7251.

"Under section 5 of the Flood Control Act, confirmation and approval of the FPC was required *prior* to the implementation of any rate increase for SWPA customers". *Fulton*, 680 F.2d 119, (App. H, *infra*, A-72). Fourth, that argument failed because it ignores the binding restraints of the unambiguous power sales contract language incorporating the statutory language of the Flood Control Act, Section 5: "rate schedules to become effective upon confirmation and approval". *Fulton*, 680 F.2d 119-120 (App. H, *infra*, A-72). And fifth, that argument failed because of the past practice of the Secretary of the Interior in seeking, and the FPC in giving confirmation and approval to proposed Flood Control Act rates before they became effective. *Fulton*, 680 F.2d 120 (App. H, *infra*, A-73–A-74). Therefore *Fulton* is in direct conflict with the court of appeals *per curiam* affirmation of the second *Sam Rayburn* judgment, which it noted to be controlled by its decision in *Tex-La* authorizing pre-final Flood Control Act rate collection. (App. B, *infra*, A-3). In its reversal of the *Tex-La* district court decision the court of appeals referred to *Fulton* and the memorandum in support of the first *Sam Rayburn* district court judgment (not then on appeal) as misreading the statute, meaning the DOE Act. *Tex-La*, 693 F.2d 395 (App. I, *infra*, A-83, A-84). Further the conflict between *Fulton* and *Sam Rayburn* is apparent in that *Fulton* approved of the *Tex-La* district court decision, 524 F. Supp. 409 (App. H, *infra*, A-76–A-77):

> In closing, we note that our resolution of the breach of contract claim now before us is further assisted by persuasive precedent established in a federal district court opinion disposing of very similar issues. *Fulton*, 680 F.2d 121-122.

Certainly in following *Tex-La* the court of appeals in *Sam Rayburn* confirmed the *Sam Rayburn/Tex-La* conflict with *Fulton*. But that conflict though direct is unusual. Thus the court of appeals in *Tex-La* wrote that "we reject many of the government's arguments and accept all of Tex-La's except

one". *Tex-La*. 693 F.2d 393 (App. I, *infra*, A-79). The *Tex-La* argument not accepted, and continuously maintained in *Sam Rayburn*, is that the DOE Act does not amend the Flood Control Act restriction against pre-final rate implementations. *Tex-La*, 693 F.2d 393 n.2 (App. I, *infra*, A-79). But the court of appeals in *Tex-La* proceeded to manufacture an unnecessary and irrelevant DOE Act amendment removing not the Flood Control Act restriction in dispute but rather the Flood Control Act's independent review of rates.[15] *Tex-La*, 693 F.2d 401-404 (App. I, *infra*, A-94–A-102). Having created this amendment the court of appeals approved the uncontested DOE administrative rate review procedure[16] and reversed the district court. *Tex-La*, 693 F.2d 411-412 (App. I, *infra*, A-116–A-117). But as regards the common issue with *Fulton*, whether pre-final Flood Control Act rates could be made effective without completion of such review by final agency action, the court of appeals erroneously found that Tex-La had conceded the issue. *Tex-La*, 693 F.2d 409 (App. I, *infra*, A-110–A-111). More importantly, while Sam Rayburn has not conceded that issue, the court of appeals has refused to reconsider the important pre-final rate aspect of *Tex-La* which

[15] *Tex-La*, 693 F.2d 402-404. Notably the court of appeals' finding that the Flood Control Act independent review was so amended does not square with the DOE Act transferring exercise of the confirmation and approval function to the Secretary and exercise of the Secretary of the Interior's rate design function to the PMA's. 42 U.S.C. 7151(b), 7152(a)(2). Moreover, if *arguendo* independent review were eliminated by the DOE Act, such amendment does not address the specific restriction against pre-final rate implementation subsequent to any review, independent or otherwise, also contained in the Flood Control Act, Section 5; "rate schedules to become effective upon confirmation and approval".

[16] The *Tex-La* district court had indicated that administrative adequacy was not the issue when it wrote:

> While delegation of final confirmation and approval authority to the FERC would be appropriate under the DOEA, the Secretary's attempt to delegate *interim* rate approval and confirmation to the Assistant Secretary of Energy for Resource Applications, pending final confirmation by the FERC, is not. Such authority was never included in the FPC function under Section 5 of the Flood Control Act, nor was it contained in the DOEA. *Tex-La*, 524 F. Supp. 418, App. G, *infra*, A-59.

it determined to control *Sam Rayburn*. Therefore, the court of appeals in *Sam Rayburn* followed its erroneous decision in *Tex-La* as to pre-final rate implementation relying on unfounded "concessions". The court of appeals also knowingly brought forth both the *Sam Rayburn* and *Tex-La* judgments in full conflict with the Court of Claims in *Fulton*. *Tex-La*, 693 F.2d 395 (App. I, *infra*, A-83–A-84).

In addition, the conflict between *Fulton* and *Sam Rayburn/Tex-La* is underscored by the district court's protested revocation of the *Sam Rayburn* initial judgment to the effect that the Government could not implement pre-final Flood Control Act rates. (Apps D, E, F, *infra*, A-6, A-8, A-10). The memorandum supporting that initial *Sam Rayburn* judgment makes favorable reference to the *Tex-La* district court's disposition of the common issues, later reversed by the court of appeals:

> *United States* v. *Tex-La Cooperative, Inc.*, No. 81-2813 (E.D. La. Sept. 8, 1981), is in accord with the present rationale and conclusion. That District Court in disallowing an interim rate increase held that such authority was never in Section 5 of the Flood Control Act, nor was it contained in the DOE Act. "[T]he implementation powers transferred are no greater than those which existed prior to the transfer." *Id.* at 15. The District Court in *United States* v. *Northeast Texas Electric Cooperative, Inc.*, No. H-81-604 (S.D. Tex. Dec. 9, 1981), relied expressly on *Tex-La*, *supra*, for its ruling that an interim rate increase was prohibited. (App. F, *infra*, A-21).

B. *The Contractual Issues*

The disputed rate increase was levied against Sam Rayburn under its power sales contract with the Southwestern Power Administration (SWPA)[17] which tracks the language of Sec-

[17] Contract No. 14-02-0001-1124, Section 4 (Feb. 13, 1964), quoted in App. F, *infra*, A-33, A-37n.15 Contained in Record, Sam Rayburn's Appendices.

tion 5 of the Flood Control Act. As such the contract restricts pre-final rate increases: "the schedule of compensation for the purchase and sale of [federal hydropower]. . . may be increased or decreased by SPA, subject to the confirmation and approval of the Federal Power Commission".[18] The *Tex-La* and *Northeast* cases, *supra*, involved contracts likewise drafted by the Government and requiring confirmation and approval by final agency action before rate increases could be made effective. These contracts were referred to by the court of claims in *Fulton*, 680 F.2d 121-122, App. H, *infra*, A-76–A-77, wherein that court held the Government to its contractual obligations:

> In *United States* v. *Tex-La Electric Cooperative, Inc.*, the Government brought suit against Tex-La, a SWPA customer, for failing to pay the interim rates prior to final confirmation and approval by the FERC. The two contracts at issue in *Tex-La* both required that any rate increase be " 'in accordance with and on the effective date specified in the final order of the FPC containing such confirmation and approval.' " In granting Tex-La summary judgment, the court concluded that "[t]he Section 5 [Flood Control Act] confirmation and approval function, incorporated into the contracts at hand, cannot be unilaterally abrogated." We adopt a similar rationale in concluding that the Government breached its contract with plaintiffs in the case at bar.

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[18] See *supra* note 17. This contract was amended on November 25, 1980, to specifically provide for pre-final rate implementation by deleting Section 4(a) and inserting a new Section 3. See language quoted in Sam Rayburn's Brief (July 7, 1983) at 42-43, filed in the court of appeals in No. 83-2341. The district court in the initial *Sam Rayburn* opinion disallowed the contract amendment as *ultra vires* the SWPA. (App. F, *infra*, A-36–A-37). In any event the amendment only covers the disputed June 1, 1979, pre-final rate increase from the effective date of the contract amendment, Nov. 1, 1980, through Jan. 7, 1981, because the FERC confirmed and approved the rate increase as final on Jan. 8, 1981.

The court of appeals in *Sam Rayburn* does not address the contract. Rather, in following *Tex-La*, the court of appeals has apparently adopted its earlier rationale that in tracking the Flood Control Act language the parties subjected themselves to the Flood Control Act judicial amendment created by the court thereby losing congressionally set protection against pre-final rate implementations. *Tex-La*, 693 F.2d 396-397, 404, App. I, *infra*, A-86, A-101-A-102. This position of the court of appeals conflicts with the Court of Claims in *Fulton* both as to the effect of the restraint against interim rates contained in the standard power sales contracts used by the SWPA, and as to the amendment of the Flood Control Act by the DOE Act.

II. The Court Of Appeals' Decision Conflicts With Principles Set By This Court

The following legal principles set by this Court are irreconcilable with the court of appeals' affirmation of the second *Sam Rayburn* judgment, and that affirmation erodes these principles.

A. *The court of appeals' decision conflicts with the principle that the Government is bound by the commercial terms of its contracts*

The legal principle has long been settled by this Court that the United States is bound to honor the commercial terms of its contracts which are valid when entered into. The *Sinking Fund Cases*, 99 U.S. 700, 718-719 (1879). The Government was held to honor the terms of a SWPA power sales contract on that very basis in *Arkansas Power & Light Company* v. *Schlesinger*, Civ. Act. No. 79-1263 (D.D.C. Oct. 20, 1980),[19] where the district court wrote that SWPA cannot "alter or repudiate a contract which was valid when entered into, but later becomes disadvantageous because of changing economic

[19] *Arkansas*, *supra* note 11.

conditions".[20] If the court of appeals' *Sam Rayburn* decision is allowed to stand the unilateral abrogation of commercial contract obligations by federal agencies will be ratified in conflict with the standard set for Government contract obligations in *The Sinking Fund Cases* and followed by the district court in *Arkansas*.

B. *The court of appeals' decision conflicts with the principle that utilities cannot unilaterally issue rate increases in violation of contract obligations*

The Court of Claims in *Fulton* indicated that it was "guided by Supreme Court precedent prohibiting unilateral rate increases proposed by utilities in derogation of express contractual terms, otherwise known as the *Mobile-Sierra* doctrine". 680 F.2d 120, App. H, *infra*, A-73. The doctrine referred to incorporates the principle set by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 340-341, 347 (1956). There, this Court wrote:

> From our conclusion that the National Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract remained the only lawful rate. *Mobile*, 350 U.S. 347.

That principle was confirmed by this Court in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). Therefore, relying on the *Mobile-Sierra* doctrine Sam Rayburn submits that the PMA's, in particular SWPA, stand in no better relation to their power sales contracts than other utilities. If contract reformation is to be achieved, it may be required in the public interest when such contracts are initially reviewed. *Cf. Sierra*, 350 U.S. 355-356. But once concluded the Government should be bound to its commercial contract terms. Efforts by the

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[20] See *supra* note 11, *Arkansas* at 4.

Government to unilaterally abrogate contract terms in *Sam Rayburn* are thus in conflict with the principle of the *Mobile-Sierra* doctrine.

C. *The court of appeals' decision conflicts with the principle against judicial legislation*

The court of appeals in *Tex-La* candidly indicated that it was interpreting the DOE Act (693 F.2d 398, 401-404, 411, App. I, *infra*, A-89, A-93–A-102), and doing so despite the clear statutory language. 693 F.2d 404, App. I, *infra*, A-100–A-102.[21] Such action is in transgression of the principle against judicial legislation recently brought to the direct attention of the court of appeals in *Griffin* v. *Ocean Contractors*, __ U.S. __, 73 L.Ed.2d 973, 980 (1982), where this Court wrote:

> The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion. . . . • • • Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive."

The only exception noted by this Court is "in rare cases" where the "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters". *Griffin*, 73 L.Ed.2d 981. The legislative history of the DOE Act evidences only an intent to transfer FPC functions, not to

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[21] The court of appeals' amendment to the Flood Control Act overlooks the continuation of the bifurcated ratemaking, which it has judicially amended, in the DOE Act Sections 301(b), and 302(a)(2), 42 U.S.C. 7151(b), 7152(a)(2).

In addition the DOE effort to reverse the FPC practice against pre-final rates is the type of abandonment of administrative abstention for newly discovered authority which this Court has restrained. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514 (1949).

amend them.[22] As such the transfer language of the DOE Act (42 U.S.C.7151(b)) is not at odds with its legislative history. The legislative history relied upon by the court of appeals to concoct a legislative intent to support judicial amendment of the Flood Control Act deals only with the centralization of energy policy making, not even with the irrelevant independent rate review ultimately relied upon by the court of appeals to reverse the *Tex-La* district court and then followed in *Sam Rayburn*.

III. The Case Presents Important Questions of Federal Law Which Should Be Settled By This Court

This case and the issue of first impression it presents are important: Whether the Flood Control Act, Section 5, prevents pre-final rate implementation. It has arisen through a DOE interpretation of the DOE Act as applied to the Flood Control Act, which the Government has admitted to be at variance with Flood Control Act rate implementation practice by the FPC before 1977. (App. F, *infra*, A-15). Thus resolution of a question of federal law is central to this dispute and will govern DOE implementation of rates for Flood Control Act hydropower sold both by the Southwestern and the Southeastern Power Administrations, as well as for hydropower sales under the Columbia River Transmission Act.[23] The conflict between *Fulton* and the court of appeals'

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[22] *See* "DOE Act Conference Report", H.R. Rep. No. 95-539, 95th Cong., 2d Sess. 65 (1977), which reads in relevant part:

> The Conference substitute transfers to the Secretary all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402 of the bill.

The balance of legislative history cited by the court of appeals in *Tex-La* 693 F.2d 402-404 (App. I, *infra*, A-97-A-102) deals only with consolidation of energy policy making and cannot support overriding the plain meaning of the DOE Act, Section 301(b), 42 U.S.C. 7151(b), that FPC functions were transferred not amended.

[23] Section 9 of this 1974 act "preserves the existing requirements of law that rate schedules by the BPA must be approved by the Federal Power Commission before they become effective." H.R. Rep. No. 1375, 93d Cong., 2d Sess., (1974) U.S. Code Cong. & Ad. News 5814.

decision in *Sam Rayburn* together with *Tex-La*, has thrown the legality of such rate implementations into confusion for both the customers and the PMA's.[24] Sam Rayburn views such confusion as the product of the DOE's efforts to avoid the cumbersome administrative review procedure which DOE has created with FERC independent review of proposed rates after they become illegally effective. Sam Rayburn and all Flood Control Act hydropower customers are impacted by the DOE's unnecessary and illegal effort to relieve this burden by administrative amendment of the Flood Control Act, Section 5, restriction, "rate schedules to become effective upon confirmation and approval". The impact appears in that such administrative amendment of the Flood Control Act removes the traditional benefit of judicial review for contested rates extended by Congress to customers, and thereby to end-users, by making proposed rates effective for pre-final interims. Customers are thereby exposed to potential serial stacking of such pre-final rates to meet escalating costs of the PMA's, while the protection of judicial review when such rates are contested is delayed sometimes for years before final rulemaking occurs; *e.g.*, June 1, 1979, to January 8, 1981, in the present case. Sam Rayburn and all customers are impacted as well by the supplanting of the clear congressionally set pre-final rate restriction of Section 5, through the actions of individual civil servants and their agency attempting to obtain administrative convenience by ignoring the law.

In the present state of confusion arising from *Fulton* and *Sam Rayburn/Tex-La*, rate planning for hydropower customers is uncertain. Further, the illegal implementation of pre-final rates places a repayment burden on end-users for rates which have not been implemented in accordance with

[24] For example the SWPA is now asking DOE to implement only final rates while in contrast SEPA rates are being implemented on a pre-final basis.

law and which are properly payable by future end-users only after final agency confirmation and approval action. Moreover, *Sam Rayburn* and *Tex-La* impact on the *Fulton* precedent causing uncertainty in the judicial forum where any other challenges to the pre-final rates likely will be brought.[25] Moreover, reversal of *Sam Rayburn* would not result in massive Government refunds because the Government has a solid defense of mutual mistake which can be raised to any refund actions not originally filed when the pre-final rates were initially protested.[26] Indeed such refund actions would have to be brought in the Claims Court where *Fulton* is precedent. Notably no additional actions have been filed even as a protective measure which indicates that the Government's defenses are understood.[27] If such repayment actions are viewed as a real concern they could be prevented by a prospective ruling in this case.[28]

The Government has already indicated the reservation of its right to seek certiorari from *Fulton*. (App. K, *infra*, A-119). The Government's apparent strategy is to obtain a denial of certiorari in this case for leverage in arguing jurisdictional questions in *Fulton* wherein it intends to persuade the Federal

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[25] No other customers, nation-wide, besides Sam Rayburn, Tex-La and Northeast, or the four cities in *Fulton*, have either accrued an unpaid balance for pre-trial rates or brought suit for refund. Without unpaid balances all other customers are only in a position to bring claims for breach of contract under the initial pre-final implementations. Customers not protesting that initial implementation will be barred by equitable considerations including mutual mistake from suing successfully for refunds of such rates now. Such customers may however, begin to accrue balances of unpaid pre-final rates and district court actions to collect such balances would be faced with the conflicting decisions in *Fulton* and *Sam Rayburn/Tex-La*.

[26] *See* Sam Rayburn's Opposition to the Government's Motion to Consolidate and for Summary Disposition 18-24 (July 7, 1983) filed in the court of appeals.

[27] *See supra* note 26, Opposition at 25.

[28] *See supra* note 26, Opposition at 35-39.

In addition, the district courts in *Tex-La* and *Northeast*, *supra*, have not entered final judgments as of this late date pursuant to the court of appeals' decision in *Tex-La*.

Circuit Court of Appeals to take review of the Claims Court's damage award and bootstrap a reversal of the Court of Claims' *Fulton* decision on the substantive law. Thus the importance of this case can well be measured not only by the litigation marathon initiated by the Government when pre-final rate authority was not included in the DOE Act (*supra* pp. 9-11), but also by the strength of the Government's opposition to this petition for certiorari. Such opposition would be disingenuous in light of the Government's own reservation of the right to seek certiorari on the same statutory and contractual issues in *Fulton*. (App. K, *infra*, A-119).

The importance of this case can be measured more positively by the quality of the opinions and attention given the dispute by the district courts on summary judgment motions in *Sam Rayburn* (App. F, *infra*, A-10) and in *Tex-La* (App. G, *infra*, A-44), as well as by the Court of Claims in *Fulton* (App. H, *infra*, A-65). However, it may be reasonable to delay proceeding with this case if certiorari is granted until certiorari either is sought or the time for seeking certiorari passes in *Fulton*.

Conclusion

For the foregoing reasons it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

RALPH J. GILLIS
ROBERT D. WILLIS
Attorneys for Sam Rayburn Dam Electric Cooperative, Inc.

October 24, 1983

APPENDIX A

United States Court of Appeals
For the Fifth Circuit

Nos. 82-2564 & 83-2341

[Filed Sept. 13, 1983]

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant-Appellee.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 7/27/83, 5 Cir., 198__, ____F.2d____)
(September 13, 1983)

Before CLARK, Chief Judge, GEE and POLITZ, Circuit Judges.

Per Curiam:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

REHG-6

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 82-2564

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant-Appellee.

No. 83-2341

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(JULY 27, 1983)
Before CLARK, Chief Judge,
GEE, and POLITZ, Circuit Judges.

PER CURIAM:

The Department of Energy placed new rates into effect for hydroelectric power on an interim basis pursuant to its Delegation Order published December 21, 1978 (43 Fed. Reg. 60636-37). The Southwest Power Administration, a govern-

ment agency, sold electric power at the new rates to Sam Rayburn Dam Electric Cooperative, Inc. The Cooperative refused to pay. It claimed that the rates violated Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s. The government brought this action to collect the rates. The district court granted summary judgment in favor of the Cooperative. The government appealed.

Meanwhile, the government had also been pursuing appeals in *United States* v. *Tex-La Electric Cooperative, Inc.* and *United States* v. *Northeast Texas Electric Cooperative, Inc.* The issues involved in *Tex-La* and *Northeast Texas* were identical in every respect to the issues involved in the instant case. After the district court granted judgment in this case, this court issued its decision in *Tex-La*, 693 F.2d 392 (5th Cir. 1982). We ruled that the rates were legal and held in favor of the government.

The government immediately moved the district court in this case to vacate its original judgment in light of *Tex-La*. The court granted the motion, vacated its prior judgment, and entered judgment against the Cooperative. The Cooperative appeals.

Thus, this court has two appeals before it that have stemmed from a single action below. The government moves to consolidate these appeals. The motion is granted.

The government also moves this court to summarily affirm the district court's final judgment. The Cooperative opposes this motion. It does not, and indeed cannot dispute the fact that the issues in the present appeal are controlled by *Tex-La*. Rather, it argues that *Tex-La* was wrongly decided. Even if that were true, this panel is powerless to overrule the mandate of a previous panel of this court. Accordingly, the government's motion for summary disposition is GRANTED and the judgment of the district court is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant.

Civil Action No. H-80-1781
[Filed Apr. 25, 1983]

FINAL JUDGMENT

This matter was taken under submission after a hearing on cross-motions for summary judgment. A final judgment for the defendant was entered on October 26, 1982. Plaintiff subsequently submitted a request to vacate that judgment after consideration of plaintiff's request, however, this Court concluded that it was bound to follow the Court of Appeals' decision in *United States* v. *Tex-La Elec. Cooperative Inc.*, 693 F.2d 392 (5th Cir. 1982). Therefore, it is ORDERED, ADJUDGED AND DECREED:

FIRST, that the judgment of October 26, 1982, is hereby vacated and that there be judgment in favor of the plaintiff, United States of America, and against the defendant, Sam Rayburn Dam Electric Cooperative, Inc.

SECOND, that the defendant shall pay to the plaintiff the principal amount of Five Hundred and Seven Thousand, Five Hundred Twenty-Four and 86/100 Dollars (507,524.86) plus interest in the amount of One Hundred Sixty-Four Thousand, Forty-Seven and 15/100 Dollars (164,047.15). This amount represents the difference in the amounts paid by the defendant from the effective date rate increase up to the time when it began paying the new rates.

DONE at Houston Texas, this 25th day of April, 1983.

/s/ Carl O. Bue, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA
v.
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.

C.A. NO. H-80-1781
[Filed Feb. 15, 1983]

ORDER

This Court entered an order on August 19, 1982, granting the defendant's motion for summary judgment and thereafter rendered a final judgment in the defendant's favor. The ruling denounced the Government's power to implement an interim rate increase for federally owned hydroelectric energy. After that decision, the Fifth Circuit reversed the district court from the Eastern District of Louisiana on a legal issue identical to the one *sub judice*, holding that such an interim rate increase was permissible. *United States* v. *Tex-La Elec. Co-op., Inc.*, 693 F.2d 392 (5th Cir. 1982). In justifying its decision, the Circuit Court explained, "Despite the implicit expression of the 'transferred but not changed' theory in sections 301(b) and 501(a)(1) of the Act, we hold that the unification of the two Flood Control Act functions in the hands of the Secretary in effect amends section 5 of the Flood Control Act to alter the strict procedural requirement of a bifurcated rate implementation scheme." *Id.* at 404.

This is, of course, contrary to this Court's rationale for its granting of summary judgment for the defendant. However, the Court is bound to follow the law of the Circuit, and, accordingly, the final judgment of October 26, 1982, must be set

aside. The Government's Motion to Vacate Final Judgment is granted. The Government shall submit a final judgment within twenty (20) days of receipt of this Order.

DONE at Houston, Texas, on this the 15th day of February, 1983.

/s/ Carl O. Bue, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant.

CIVIL ACTION NO. H-80-1781
[Filed Oct. 26, 1982]

FINAL JUDGMENT

This matter was taken under submission after a hearing on cross motions for summary judgment.

Now, therefore, pursuant to and for the written reasons of the Court contained in the Memorandum and Order of August 19, 1982, and the Order of September 20, 1982, on file herein, it is

ORDERED, ADJUDGED and DECREED:

FIRST, that there be judgement [sic] in favor of the defendant, Sam Rayburn Dam Electric Cooperative, Inc., and against the plaintiff, United States of America, dismissing said plaintiff's complaint on the merits.

SECOND, that *Part 3*, Section 3(a), of Contract No. 14-02-0001-1124-2 (November 25, 1980), is in derogation of statutory authority and declared void, the underlying Contract No. 14-02-0001-1124 (February 13, 1964) as otherwise amended by Contract No. 14-02-0001-1124-2 remaining in full force and effect between the plaintiff and the defendant.

THIRD, that the plaintiff shall pay to the defendants Sixty-six Thousand Four Hundred Fifty-eight and 84/100 Dollars

($66,458.84), which is the amount of increase that defendant paid under the invalid contract amendment. Further, interest shall be paid on that amount at nine percent (9%) per annum to run from and after the date of this final judgment.

DONE at Houston, Texas, this 26th day of October, 1982.

/s/ CARL O. BUE, JR.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA
v.
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.

CIVIL ACTION NO. H-80-1781

[FILED AUG. 13, 1982]

C. Mac Vassanelli, William Z. Elliott, and Leland Ware, Department of Justice, 10th & Pennsylvania Ave., N.W., Washington, D. C., attorneys for plaintiff.

Ralph J. Gillis, 15 Main Street Extension, Suite 5, Plymouth, Massachusetts, attorney for defendant.

MEMORANDUM AND ORDER

The parties in the present case have submitted cross motions for summary judgment, and both agree there is no dispute as to any material fact. Therefore, it is for this Court to interpret the law dealing with the sale of hydroelectric power by a federal agency and correctly apply that law to the facts at hand. There are two major issues for decision: (1) whether the Secretary of Energy has the statutory authority to implement an interim rate increase before that increase has been finally approved, and (2) whether the terms of the parties' contract permits an interim rate to become effective before its final confirmation. For the reasons set out more fully below, the Court concludes that the defendant must prevail on both of these issues. Accordingly, the defendant's motion for summary judgment is granted, and that of the plaintiff is denied.

Background

The subject matter of this case is the sale of hydroelectric power by a federal agency, and the original statute which governed that process was Section 5 of the Flood Control Act of 1944. 16 U.S.C. §825s (1976). That statute vested the Secretary of the Department of the Interior with the responsibility for developing rates for the marketing of electric power and energy generated by reservoir projects constructed by the Department of the Army. The Southwestern Power Administration (SWPA) was established by the Secretary of the Department of Interior pursuant to Secretarial Order No. 1865 on August 31, 1943. Subsequently, the Secretary's power marketing responsibilities in the Southwestern Region of the United States, including Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas were delegated to SWPA.

A contract providing for the purchase and sale of all of the electric power and energy generated at the Sam Rayburn Dam was entered into by the parties on February 13, 1964. The term of the agreement initially covered a 20 year period which began on January 1, 1965, and extended through December 31, 1985. Service began on July 1, 1966. The agreement provided for the initial rate to extend through June 30, 1970, and it specifically authorized SWPA to revise the rates at five year intervals thereafter.

In 1977, the Department of Energy Organization Act, 42 U.S.C. §§7101, *et seq.* (Supp. 1980) (the "DOE Act") transferred the Department of Interior's power marketing responsibilities under the Flood Control Act to the Department of Energy (DOE). In addition, the Federal Power Commission's (FPC) responsibilities to confirm and approve rates developed by the Secretary of Interior under the Flood Control Act were also transferred to DOE by that statute. Subsequently, on December 21, 1978, the Secretary of DOE issued an order delegating the authority to establish rates under the Flood Control Act and to place such rates into effect on an interim basis to the Assistant Secretary for Resource Applications. 43 Fed. Reg. 60,636 (1978). By the same order, the authority for

final confirmation of such rates was delegated to the Federal Energy Regulatory Commission (FERC).

The United States, through SWPA, determined pursuant to a study that costs were not being recovered from its sales of hydroelectric power and energy. Consequently, SWPA redesigned the rate for such power and sought to implement the new rate against the defendant on an interim basis pending confirmation and approval by the FERC. The rate order in question in this case was issued on April 12, 1979, and stated that the rate increase would become effective on an interim basis on June 1, 1979, subject to subsequent confirmation by FERC. The defendant has refused to pay the rate increase because it contends that it was not liable for the new rate until it was confirmed by FERC.

On November 24, 1980, SWPA and defendant executed an amendment to the contract, extending the term of the agreement through December 31, 1995. Sam Rayburn has paid the interim rate increase for the period between November 1, 1980, and January 8, 1981, the date of final confirmation by the FERC. Consequently, plaintiff claims the difference between the old and new rates, approximately $29,858 per month, from June 1979 until November 1980.

Defendant contends that the date of final confirmation by the FERC is the true effective date for the new rate. Additionally, defendant argues that there is no statutory authority to support the contract amendment and that it is, therefore, unenforceable.

Statutory Authority

The origin of analysis is Section 5 of the 1944 Flood Control Act which grants the authority and outlines the general procedure to be taken in the sale of hydro-electric power by a federal agency:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

16 U.S.C. §825s (1976). This section can be distilled into four basic statements. First, energy from reservoir projects, energy which is generated as the water flows over the dam, is to be delivered to and come under the control of the Secretary of the Interior. It is then his duty to dispose of, that is, to sell such power to consumers at the lowest possible rates which sound business practice will allow. Third, the rate schedule set by the Secretary of the Interior is to become effective *upon* confirmation and approval by the FPC. And finally, the Secretary is directed to set the rate at a level which will allow the government to recover the cost of producing and transmitting the power. It thus appears that the Secretary of the Interior, with regard to rates, was given two responsibilities: to design rates that not only would be fair to the consumer, being as low as practically possible, but also be sufficient to recover the costs of producing and transmitting the energy. The corresponding responsibility of the FPC was to examine the rates so designed by the Secretary and then to approve them if the two stated re-

quirements were met. Section 5 establishes two separate and distinct functions: (1) the formulation of appropriate rate schedules by the Secretary of Interior, and (2) the confirmation and approval of rates by the FPC.

When the Department of Energy Act was passed in August 1977, these two functions were transferred under Subchapter III to the Department of Energy and specifically to the Secretary of Energy:

> Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary [of Energy] the function [sic] of the Federal Power Commission, or of the members, officers, or components thereof. . . .

42 U.S.C. 7151(b) (Supp. 1981). This subsection tranferred to the Secretary of Energy all of the functions previously exercised by the FPC except those enumerated in subchapter IV of the Act. Accordingly, to know which functions were not transferred to the Secretary of Energy, we must examine the enumerated exceptions in subchapter IV, and in Section 402 there are listed those functions of the FPC which were transferred to the FERC rather than to the Secretary. The function concerning rates is contained in subsection (a)(1)(B):

> (a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:
>
> • • •
>
> (B) the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

42 U.S.C. 7172(a)(1)(B) (Supp. 1981). Upon a cursory reading, it appears that this section transfers from the FPC to the FERC all of the rate making functions, including the

primary role in confirmation and approval of rates discussed above. But closer scrutiny reveals a qualification. This section concerns the establishment, review, and enforcement of rates under part II of the Federal Power Act, and part II of that Act regulates investor-owned companies rather than federal power marketing agencies. A provision of that subchapter specifically excludes application to any federal or state agency.[1] Hence, Section 402 does not include in its enumerated exceptions the previously existing FPC authority to confirm and approve federal power marketing rates under Section 5 of the Flood Control Act; rather this authority is transferred to the Secretary under Section 301. *Accord Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980).

Another major transfer was made under Section 302 of the DOE Act. The language very clearly states that all of the functions of the Secretary of the Interior under section 5 of the 1944 Act and all of the other functions of the Secretary of the Interior with respect to the various federal power marketing agencies were transferred to the Secretary of Energy.[2]

Plaintiff in the present case recognizes that prior to the enactment of the DOE Act, the rates developed by the Secretary of the Interior did not become effective until they were confirmed and approved by the FPC. (Plaintiff's Memorandum at 6, May 12, 1981). But plaintiff contends that the relevant transfer provisions of the DOE Act somehow altered that procedure, that the DOE Act eliminated the original bifurcated process when it vested both rate establishment and approval authority in the Secretary of Energy. It is important to note that in each of the three provisions analyzed above[3] the word "transferred" is consistently used. The verb transfer is defined "to convey or remove from one place, person, etc., to another; pass or hand over from one to another; to make over the possession or control of (as, to transfer a title to land); sell or give." Black's Law Dictionary 1669 (4th ed. 1968). Thus, the thing transferred is not changed, enlarged or altered. It is passed from one to another.

This literal interpretation is bolstered further by two ancillary provisions. The first is Section 501 which states:

> If any provision of any Act, the functions of which are transferred, vested or delegated pursuant to the chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

42 U.S.C. §7191(a)(1)(Supp. 1981). This section deals with the procedures for issuance of rules, regulations or orders, and the quoted portion requires that in the promulgation of new rules the Secretary of Energy will be bound by the procedures contained in the acts from which his functions were transferred. Section 5 of the 1944 Flood Control Act required the bifurcated procedure of formulation and approval, and Section 501 confines the Secretary of Energy to that two-step process.

The second supporting provision is found in Subchapter VI, Administrative Provisions. Section 641 provides:

> To the extent necessary or appropriate to perform any function transferred by this chapter, the Secretary [of Energy] or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

42 U.S.C. §7251 (Supp. 1981). This type of language is commonly known as an administrative or "enabling provision." It enables the Secretary of Energy to exercise any authority necessary to perform the substantive functions transferred to him by the Act. In *Alaska Bulk Carriers, Inc.* v. *Kreps*, 595 F.2d 814 (D.C. Cir. 1979), *rev'd on other grounds, Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980), the Court of Appeals discussed a similar statute from the Merchant Marine Act of 1936. Section 207 of that Act allows the Secretary of Commerce to enter into such contracts or make

such disbursements as may "be necessary to carry on the activities authorized by" the Act. 46 U.S.C. §1117 (1970). The court stated,

> We think § 207 is what is commonly called a 'housekeeping statute', and a similar provision is found in nearly every administrative agency basic statute. It is a section which details the means and methods of implementation of specific powers which are granted elsewhere in the statute. It is not an independent grant of power in itself.

Id. at 835. A leading and often cited case on this same subject is *New England Power Co.* v. *FPC*, 467 F.2d 425 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974), which involved the administrative provisions from the Natural Gas Act and the Federal Power Act.[4] These provisions have the same "necessary or appropriate" language as does Section 641 of the DOE Act. The Court of Appeals for the District of Columbia explained,

> Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented 'consistently with the provisions and purposes of the legislation,' [cites omitted], and 'that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.' [cites omitted] These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act.' *Mesa Petroleum Corp.* v. *FPC*, 441 F.2d 182 (5th Cir. 1971).

467 F.2d at 430. A third case from the District of Columbia is instructive on the subject.

> The substantive provisions of the [Natural Gas] Act contemplate certain procedures, as incident to the functions provided. The range of permissible procedures must be

> derived from these sections, sections like sections 4 and 5 of the Natural Gas Act, and the functions they describe. Section 16, which uses a broad generality of 'necessary or appropriate' that is not rooted in a function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.

Mobil Oil Corp. v. *FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973).

While it is true that the administrative statutes are to be broadly construed, *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), the "housekeeping" or administrative provisions must relate to the authority given and functions prescribed in the substantive provisions. The agency or official must look first to the substantive provision to determine the authority or functions defined therein, and then through the administrative provision the agency may exercise the "necessary and appropriate" steps to carry out that function. The agency or official may not, therefore, enlarge the choice of permissible procedures or exceed the authority given in the substantive provision. "If [the Secretary of an Executive Department] by affirmative act exceeds his lawful authority or threatens to do so, to the injury of established rights, he may be enjoined, for in such circumstances he is not truly representing the Government." *United States Dept. of Agriculture* v. *Hunter*, 171 F.2d 793, 795 (5th Cir. 1949).

Section 641, the administrative provision of the DOE Act, allows the Secretary of Energy to exercise the authority which is necessary and appropriate in carrying out the functions transferred to him. However, as in Section 501, this authority is again qualified: The Secretary may exercise any authority "available by law ... to the official or agency from which such function was transferred." The authority to be exercised must have been previously available to the transferring official or agency.

This Court has not been directed to any case law prior to the enactment of the DOE Act which interprets Section 5 of the 1944 Act any differently from the above. Plaintiff has cited no cases but cites four agency rulings in which the FPC approved interim rates for power and energy marketed by federal agencies.[5] It is noteworthy that the few reported cases, (none of which deal with the question of interim rates), construing Section 5 have followed the bifurcated procedure. *See Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). It is accurately stated that the FPC did, in fact, grant approval of rate increases for an interim period pending final action by the Commission, as illustrated by the four agency rulings. Generally, a federal court will defer to the agency's ruling on a matter within that agency's sphere of authority, and the construction given to a statute by those charged with its execution is not to be overturned unless it is clearly wrong. *Grigsby* v. *Department of Energy*, 585 F.2d 1069 (Emer. Ct. App.), *cert. denied*, 440 U.S. 908 (1979); *see Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381 (1969). But these agency rulings are not binding on a court, nor do they establish precedent.

The construction of statutes and other laws is a matter which ultimately is solely for the courts. In an early case, *Western Union Teleg. Co.* v. *Brown*, 253 U.S. 97 (1920), Justice Holmes rejected the petitioner's argument that the courts were bound by the ICC's determination of the agency's rule and stated, "[T]he question is of the meaning of a statute, and upon that, of course, the courts must decide for themselves." 253 U.S. at 99. The courts show great deference to the interpretation given the statute by the officers or agency charged with its administration, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and the construction given by the agency is an aid to the courts. The Supreme Court explained in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944),

> [T]he rulings, interpretations and opinions of the [particular agency] . . ., while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. However, administrative construction does not control the court's decision as to the proper interpretation of the law, and where it is manifestly wrong or clearly erroneous it will not be followed but will be rejected. There is a plethora of Supreme Court cases which have ruled or recognized that the principle which accords weight to interpretation of a statute by the agency entrusted with its administration is inapplicable insofar as the administrative construction is inconsistent or in conflict with the statute or the congressional purpose in enacting it.[6] And in accordance with this rule, the Supreme Court has also held that administrative agencies may not, under the guise of construction, restrict or enlarge the meaning of a statute. It was held in *Texas & P.R. Co.* v. *United States*, 289 U.S. 627, 640 (1933), that where a statutory body, in that case the Interstate Commerce Commission, has assumed a power plainly not granted, no amount of the Commission's interpretation is binding upon the court. The Supreme Court again ruled against an agency's enlarging the controlling statute in *SEC* v. *Sloan*, 436 U.S. 103 (1978). There the Securities & Exchange Commission argued that its consistent and longstanding practice of "tacking" more than one 10-day suspension order was valid under the statute. In rejecting the Commission's argument, the Supreme Court stated:

> While this [rule of deference] undoubtedly is true as a general principle of law, it is not an argument of suffi-

> cient force in this case to overcome the clear contrary indications of the statute itself. . . . [T]he mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks "power to persuade" as to the existence of such authority. *Skidmore* v. *Swift & Co.*, 323 u.[sic]S. 134, 140 (1944). Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.
>
> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has "reasonable basis in law." [Cites omitted.] But the courts are the final authorities on issues of statutory construction, [cites omitted], and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' [Cites omitted.]

436 U.S. at 117-18. This Court finds that the prior rulings by the FPC are indeed inconsistent with the statutory mandate of Section 5 of the Flood Control Act, and, further, this Court cannot "rubber-stamp" an affirmance of those decisions.

United States v. *Tex-La Cooperative, Inc.*, No. 81-2813 (E.D. La. Sept. 8, 1981), is in accord with the present rationale and conclusion. That District Court in disallowing an interim rate increase held that such authority was never included in Section 5 of the Flood Control Act, nor was it contained in the DOE Act. "[T]he implementation powers transferred are no greater than those which existed prior to the transfer." *Id.* at 15. The District Court in *United States* v. *Northeast Texas Electric Cooperative, Inc.*, No. H-81-604 (S.D. Tex. Dec. 9, 1981), relied expressly on *Tex-La, supra*, for its ruling that an interim rate increase was prohibited.

Defendant in the case *subjudice* contends that the similarities in *Tex-La* bar the action by plaintiff on the basis of collateral estoppel. However, the courts of appeals traditionally have permitted federal agencies to relitigate substantially identical legal issues raised by different transactions or events, especially after adverse rulings elsewhere. *Western Oil & Gas* v. *United States*, 633 F.2d 803, 808 (9th Cir. 1980). Indeed, there are important policy considerations in allowing a different court to entertain the same legal issue. *See American Medical International* v. *HEW*, 677 F.2d 118 (D.C. Cir. 1981); *Divine* v. *Commissioner of Internal Revenue*, 500 F.2d 1041 (2d Cir. 1974), (allowing the agency to relitigate the same legal issue in another circuit). For these reasons, this Court declines to apply the doctrine of collateral estoppel but rather decides the case on its merits.

In summary, under the procedure established by the Flood Control Act of 1944, the Secretary of the Interior was to propose a rate that he viewed as reasonable to cover the costs of producing and transmitting the power but still as low as possible for the consumer. The function of the FPC was to discern whether or not the rate proposed by the Secretary of Interior had achieved that end. The process was essentially one of checks and balances, as the new rate could not become effective until it had been approved by the FPC. The various transferring statutes of the DOE Act vested the authority for both functions, formulation and approval, in the Secretary of Energy. Until he delegated the approval function to the FERC, the Secretary had the authority to propose rates for the sale of hydroelectric energy and the authority to confirm the rates as well. By virtue of these statutes, the Secretary of Energy could approve what he had proposed. This Court readily concedes that it does not always understand the reasoning or logic behind all of the enactments by the Legislature, but it is the role of the judiciary to interpret and apply the laws and not to question the wisdom of those who

made the laws. As the United States Supreme Court has stated, "[I]t is for Congress, not the courts, to write the law." *Standard* v. *Olesen*, 74 S. Ct. 768, 771 (1954). The legislative history does not reveal the intent behind the transfer of both functions to the Secretary of Energy, but as to the transfer of rate making to the FERC under Section 402,[7] the Legislature has stated that "[n]o single official should have the sole responsibility for both proposing and setting such prices." 1977 U.S. CODE CONG. & AD. NEWS (91st Stat.) 891. No such distinction was made where the sale of energy is by a federal marketing agency.

Accordingly, this Court concludes that both functions were transferred to the Secretary of Energy and that the original bifurcated process established by Section 5 of the 1944 Act was not discarded or altered but was transferred *in toto* to the Secretary of Energy. That transfer created no power to establish and collect an increased amount for the sale of the energy between the time the increase is proposed and the time it is approved. In short, there was no creation of a power to implement an interim rate.

Delegation

The Flood Control Act established the substantive authority for the actions in question. The approval authority, originally held by the FPC under the Flood Control Act, was transferred to the Secretary of Energy by Section 301(b) but was subsequently delegated to the FERC by Delegation Order No. 0204-33. 43 Fed. Reg. 60,636 (1978). Neither party contests the validity of this order, and indeed the DOE Act in Section 642 authorizes the delegation:

> Except as otherwise expressly prohibited by law, and except as otherwise provided in this Chapter, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such func-

tions within a Department as he may deem to be necessary or appropriate.

42 U.S.C. §7252 (Supp. 1981).

Attention is focused on this delegation because as a practical matter the approval authority now rests in the FERC. According to the tracing theory employed in the *Tex-La* case and used as a basis for this Court's decision, the function of approval and confirmation was first posited in the FPC, then transferred to the Secretary of Energy, and finally delegated to the FERC. Although no statute expressly provides for this authority to be exercised by the FERC, it was nevertheless validly conveyed to this entity by virtue of Sections 301(b) and 642 of the DOE Act, and by the implementing delegation order. The same delegation order conveyed the formulation authority to the Assistant Secretary for Resource Applications, 43 Fed. Reg. 60,636 (1978). Hence, the bifurcated procedure originated by the Flood Control Act is now exercised by two different entities. The Assistant Secretary must propose an appropriate rate, taking into consideration the factors found in Section 5 of the Flood Control Act, and the FERC must then approve the new rate before it can become effective.

Legislative History

The available documents to show congressional intent regarding rate-making under Section 5 of the Flood Control Act are sparse. The Court has studied the many committee reports from the House and Senate on this Act, but few of them relate directly to rate schedules and to implementation of rates. It is axiomatic that congressional intent is the guidepost to judicial interpretation of federal statutes. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). And, where the interpretation of a particular statute at issue is in doubt, the express language and legislative construction of another statute not strictly *in pari materia* but employing similar persons, things, or cognate relationships may control by force of analogy.

Stribling v. *United States*, 419 F.2d 1350, 1352 (8th Cir. 1969). Section 6 of the Bonneville Project Act of 1937 contains the same bifurcated procedure as found in Section 5 of the Flood Control Act, and in part it provides:

> Schedules of rates and charges for electric energy produced at the Bonneville project and sold to purchasers as in this chapter provided shall be prepared by the administrator and become effective upon confirmation and approval thereof by the Federal Power Commission. . . .

16 U.S.C. §832e (1976).

The report from the Committee on Rivers and Harbors states in its specific analysis of sections of the bill that "[r]ate schedules and revisions thereof shall from time to time be prepared and *submitted* by the Administrator [the official in charge of transmission and distribution of the surplus electric energy] to the Federal Power commission" and "such rate schedules shall become effective as approved by the Federal Power commission." [sic] H.R. REP. NO. 1090, 75th Cong., 1st Sess. 509 (1937). (emphasis added). The word "submitted" is significant because it intimates that the rate schedule so proposed is not final but that it is being given to the FPC for its scrutiny.

The Bonneville Project Act was amended in 1945, although the sections on rate schedules were not significantly changed, and the committee report states, "Sections 2 and 3 are technical amendments to authorize the Administrator to dispose of energy to other Federal agencies and to do so *at rates approved by the Federal Power Commission*." H.R. REP. NO. 777, 79th Cong., 1st Sess. 874 (1945) (emphasis added). The Administrator would be allowed to dispose of the energy only at rates approved by the FPC. This report refers to the Flood Control Act in its sectional analysis where it states, "The dispositions authorized will be on the same basis as sales, namely, at rates approved by the Federal Power Commission. This accords with the policy incorporated in recent bills and

acts, including the Flood Control Act (PUBLIC LAW 534, 78th Cong.) enacted last December." *Id.* at 876. As with the Flood Control Act, there are no reported cases construing Section 6 of the Bonneville Project Act.

To analyze the reports, the Court considers three points: (1) that the official was to *submit* the proposed rate schedule to the FPC, (2) that the 1945 amendment did not change this procedure, and (3) that the 1945 report directly compares the Bonneville Project Act to the Flood Control Act. From these considerations it appears that Congress intended that the official designing the rate schedule would submit such schedule to the FPC for its approval before that rate would become effective.

Lastly, the House Committee on Flood Control reported to Congress in 1944 that the primary purpose of the Flood Control Act was to alleviate the serious flooding problems and damage done by torrential downpours of rain in the early 1940's. The only slight reference to hydroelectric energy was a statement of practicality:

> The plans are comprehensive in scope and contemplate the most practicable and economical method of providing flood control, and, where practicable, of conserving the flood waters for beneficial uses. In each case, they have been planned with a view to producing the greatest good to the greatest number of people. The plans include multiple-use reservoirs which will permit the development of economical hydroelectric power in addition to providing storage for flood control, irrigation, water supply pollution control, and other purposes.

H.R. REP. NO. 1309, 78th Cong., 2d Sess. 1354 (1944). Thus, the thrust of this legislation was to provide security for the people of regions where flooding had been a problem and, as a matter of practicality, to use the resulting energy produced at the reservoirs. With no mention of implementation of rates, the only guidance that the Court has of the legislative in-

tent underlying the Flood Control Act is the clear language of the statute and the analogy to the Bonneville Project Act. This Court concludes that both of these sources clearly indicate that Congress intended that there be no interim rate increases but that any rate proposed by the named official, either the Secretary of Interior or the Administrator of the Bonneville Project, should be approved and confirmed by the FPC before it would become effective.

Reliance on FPC v. Natural Gas Pipeline Co.

The government relies heavily on the Supreme Court case, *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), to support its contention that interim rate authority is inherent in the general rate setting authority vested in the Secretary of Energy. In that case the FPC began an investigation of the two respondent gas companies' rates with a view towards determining whether they were just and reasonable. That determination involved many complex calculations which would take months of sifting through figures. Until this process was completed, the FPC issued an interim order directing that the rates be reduced and requiring that the respondents file new schedules to reflect the reduction. The Court of Appeals for the Seventh Circuit upheld the Commission's authority under the statute to issue the interim order but vacated the order on grounds related to going concern value and amortization. Although the Supreme Court resolved several issues, the only one pertinent to the case *sub judice* is the validity of the interim order.

There is persuasive language in *Natural Gas Pipeline* to support the plaintiff's position, and taken out of context that language would seem to end the controversy:

> The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discrimination and unfairness from its details.

Id. at 584. The gas companies in *Natural Gas Pipeline* contended that the FPC did not have the authority under the Act to enter the interim order at issue, and they argued further that the FPC itself had to fix the reasonable rate as required by the Act instead of directing the companies to file a new rate schedule. The substantive provision which controlled the resolution of that issue is Section 5 of the Natural Gas Act: "[B]ut the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U.S.C. § 717(a) (1976). The Supreme Court found that this provision had been modeled after the provisions of the Transportation Act and that the corresponding sections under that Act had been interpreted as giving the ICC authority to enter an interim order in advance of a schedule to be filed later by the carriers. The Court ruled:

> [T]he provision of §5 already quoted contemplates that, when existing rates are found to be unjust and unreasonable, an order decreasing revenues may be filed without establishing a specific schedule of rates. Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act, it is one which the Commission has discretion to make under §16 as appropriate to carry out the provisions of the Act.

Id. at 585.

Natural Gas Pipeline can be distinguished on several points. First, the statute governing that case is for the purpose of regulating increased rates filed by investor-owned companies which market or transport natural gas. Section 5 of the Flood Control Act regulates the sale of hydro-electric energy by a governmental agency. A later Supreme Court decision construing the Natural Gas Act stated, "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *FPC* v. *Hope Natural Gas*

Co., 320 U.S. 591, 610 (1944). As stated previously under *Legislative History*, this Court believes that the purpose of the Flood Control Act was to prevent destruction of lands and secondarily to make efficient use of the reservoirs constructed. More specifically, Section 5 allowed only the recovery of costs, whereas the Natural Gas Act allowed investor-owned companies to recover just and reasonable profits.

The second distinction is that the FPC entered an interim order that the rate was to be decreased. The FPC did not set the new lower rate but directed the gas company, pending further investigation by the FPC, to set the lower rate, one not "unjust, unreasonable and excessive." *Id.* at 580. In that instance the governmental agency was regulating a private corporation which it found to be overcharging the public. In the present instance, the governmental agency is not only the seller but also the entity regulating itself. Further, the rate is not being decreased but increased. The subject matter of the present dispute concerns not an interim order by the regulating body, as in *Natural Gas Pipeline*, but an interim rate increase by the seller.

A third distinction is that the Supreme Court in *Natural Gas Pipeline* had guidance from decisions construing a statute after which the Natural Gas Act was modeled. Similar statutory language had been interpreted in prior cases to allow the ICC to enter an interim order like the one issued by the FPC in *Natural Gas Pipeline*. There are no such guidelines in our case, and there are no exemplary cases construing a model statute.[8]

A final and important distinction is that Section 5 of the Natural Gas Act specifically gave the FPC the authority to order a decrease. Also, in Section 4, the Act allowed the FPC to suspend the operation of a new rate filed by a gas company up to five months pending a hearing by the agency. During this period the agency could enter an interim or temporary rate decrease. However, if the hearing was not concluded in five months, the new rate, on motion of the gas company,

would go into effect subject to refund for an unjust rate. 15 U.S.C. § 717c(e) (1976).[9] The provision controlling the present case has no such language. To the contrary, Section 5 of the Flood Control Act specifically directs that the rates are to be set by the Secretary of Interior, "to become effective upon confirmation and approval by the Federal Power Commission." The section relied upon in *Natural gas Pipeline*, [sic] Section 5 of the Natural Gas Act, allowed the FPC to order a decrease without any required confirmation or approval.

Plaintiff asserts that Section 16 of the Natural Gas Act is the statutory basis for the Supreme Court's ruling in *Natural Gas Pipeline*.[10] However, this provision is an administrative statute much like Section 641 of the DOE Act. As such, Section 16 is implementary, and it creates only the authority which is necessary to carry out Sections 4 and 5, the substantive provisions. A close reading of *Natural Gas Pipeline* reveals that it was Section 5, not Section 16, which governed the Court's decision.

Plaintiff compares Section 16 of the Natural Gas Act with Section 301(b) of the DOE Act which states:

> (b) Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172 (a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

42 U.S.C. §7151(b) (1981). The first sentence is the foundation for the premise established in a preceding section, *Statutory Authority*, that the approval function of the FPC was transferred to the Secretary of Energy. It is the second sentence which is relevant to the present discussion. It allows the Secretary of Energy to exercise "any power described in

section 7172(a)(2)" which he deems necessary to carry out those functions that have been transferred to him. Accordingly, to understand what this second sentence means, Section 7172(a)(2) must be dissected as well.

Section 7172(a) (2) provides:

> (2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:
>
> (A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and
>
> (B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

This provision lists twelve sections of the Federal Power Act and nine sections of the Natural Gas Act. These sections establish certain powers, all of which may be exercised by the Secretary of Energy through Section 301(b) of the DOE Act quoted above. However, none of these powers pertains to rate making or in any way gives the FPC, and derivatively the Secretary of Energy, rate making authority.[11] Therefore, plaintiff's reliance is misplaced when it concludes that sections 301 and 302[12] are "virtually identical" to the grant of authority which supported the interim order in *Natural Gas Pipeline*. It is true that the second sentence of Section 301(b) allows the Secretary of Energy to exercise the power necessary to carry out the functions transferred to him, but he is limited to those specific powers listed in 7172(a)(2). One must conclude that if authority to enter an interim rate increase is not contained in any of these provisions, it cannot be exercised by virtue of 301(b). There is no such power listed, and thus there is no such power granted to the Secretary of Energy by Section 301(b).

Plaintiff cites two subsequent Supreme Court decisions, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). These cases have compelling language which at first blush ap-

pears to be conclusive on the matter of interim rates. "[T]here is 'no question' as to the Commission's authority to issue interim rate orders." *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. at 150 (1962). "[E]ntering the interim order was not only entirely appropriate but in the best tradition of effective administrative practice." *Id.* at 155. Yet, both of these cases rely exclusively on the authority established in *Natural Gas Pipeline*. Inasmuch as this Court has determined that *Natural Gas Pipeline* is inapplicable to the present cause, its progeny must likewise be rejected.

Two recent cases have relied on *Natural Gas Pipeline* to allow interim rate increases by the government. Both of these cases involve the application of Section 6 of the Bonneville Project Act of 1937, a statute very similar to Section 5 of the Flood Control Act. The Court in *Pacific Power & Light Co.* v. *Duncan*, 499 F. Supp. 672 (D. Ore. 1980), found that the agency had inherent or implied authority to implement the contested interim rates and supported that finding by quoting from *FPC* v. *Tennessee Gas Transmission Co.*, *supra*, and *FPC* v. *Hope Natural Gas Co.*, *supra*. This Court respectfully differs with the conclusion reached by the Oregon Court, and with deference it is submitted that those cases cited by that Court do not apply to the statutes at hand.

The Oregon Court again ruled in favor of the government in *Montana Power Co.* v. *Edwards*, 531 F. Supp. 8 (D. Ore. 1981). The Court stated, "Nonetheless, powers not explicitly granted can be inferred, despite some legislative history which suggests the contrary." *Id.* at 10. For this statement, the District Court relied on *United States* v. *Exxon Corp.*, 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980); and *Atlantic Richfield Co.* v. *United States Dept. of Energy*, 500 F. Supp. 1301 (E.D. Pa. 1980), *aff'd*, 655 F.2d 1118 (Emer. Ct. App. 1981). Both of these cases, as in *Natural Gas Pipeline*, involved statutes which regulate private industries in order to protect consumers against exploitation.[13] Section 5 of

the Flood Control Act is not a regulatory statute but a procedural one. It was enacted to guide the Secretary of Interior and FPC in arriving at appropriate rates. Further, in the *Exxon* case, the subpoena power in question had been expressly created by an earlier enacted statute. Yet, the interim rate-making power now in question never existed under Section 5. Finally, neither of the statutes in the two cases cited by the Oregon Court contained any limitation on procedure as Section 5 does. Accordingly, after careful consideration of the opinions issues by the Oregon Court, this Court must hold fast to its conclusion that there is no inherent or implied authority to enter the interim rate increase.

Contractual Authority

The contract binding the parties tracks the wording of the 1944 Flood Control Act, and the pertinent language states:

> Section 4. *Change in Payment for Hydro Power and Energy*. (a) at any time after July 1, 1970, and from time to time thereafter, but not oftener than once every five years, the schedule of compensation for the purchase and sale of "Hydro Power and Energy" set forth in Section 3(a) of this Article II may be increased or decreased by SPA, subject to the confirmation and approval of the Federal Power Commission. Any such new schedule of compensation shall become effective and applicable to the purchase and sale of "Hydro Power and Energy" under this Article II in accordance with and on the date specified in the order of the Federal Power Commission containing such confirmation and approval.

Article II, Section 4(a) of the Sam Rayburn-SWPA Contract No. 14-02-0001-1124 (February 13, 1964).

It is well established that the United States is bound by the terms of its contracts which are valid when entered into.

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is

> as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

The Sinking Fund Cases, 99 U.S. 700, 719 (1879). The Supreme Court followed the principle of *The Sinking Fund Cases* in *Lynch* v. *United States*, 292 U.S. 571 (1934). At issue was the Economy Act of 1933 which authorized Congress to abrogate its responsibility under certain War Risk Insurance policies.

> Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.

292 U.S. at 580. "In other words, the need for money is no excuse for repudiating contract obligations." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977).

A case governed by Section 5 of the Flood Control Act dealing with a contract dispute is *Associated Elec. Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). The issue was whether the existing rate schedule could be revised by adding a transmission charge to cover costs, which charge effectively eliminated certain credits due the plaintiff under the contract. The District of Columbia Circuit Court found that Section 5 required such recovery of costs even though the action incidentally decreased the amount credited to plaintiff. Additionally, the court found that the contract terms allowed such increase. The bifurcated procedure of rate proposal by the Secretary followed by confirmation from the FPC was used in *Associated Elec. Cooperative*. And, although interim rate making was not at issue, the principle gained is that both statutory and contractual authority are necessary to effect a valid rate increase.

A second case concerning a contract dispute and governed

by Section 5 of the Flood Control Act is *Arkansas Power & Light Co.* v. *Schlesinger*, No. 79-1263 (D. D.C. Oct. 20, 1980). In that case the plaintiff and SWPA entered into a contract for the sale of power whereby certain maximum rate increases were set. SWPA raised the rate above this maximum, and the Court ruled that this was a breach of contract, stating,

> The dictum in *Associated Electric Cooperative* is not authority for the proposition that the government can alter or repudiate a contract which was valid at the time it ws [sic] entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legislative history cited to this court indicates that Congress intended the Flood Control Act to give the government authority to unilaterally alter existing contracts.

The same principle applies in the instant controversy. The government cannot alter or repudiate its contract, and the Flood Control Act does not give the government authority to unilaterally alter the existing contract because of changing economic conditions. To effect a valid rate increase, both parties must follow the terms of the contract.

A third important case dealing with the issue of contractual authority for rate increases is *Colorado River Energy Distributors Asso.* v. *Lewis*, 516 F. Supp. 926 (D. D.C. 1981). The issue there was whether the Secretary of Energy had authority under the Reclamation Project Act and under the terms of the contract to implement an interim rate increase for electric power sold. The language of Section 9(c) of the Reclamation Act is much broader than that of Section 5 of the Flood Control Act, and that statute leaves rate determination and implementation totally to the judgment of the Secretary without statutory restraint.[14] The District Court found both statutory and contractual authority for the interim rate increase.

> The Secretary's authority to enter into contracts or leases for the sale of power is provided in section 9(c). That power to contract is limited only by the specific terms of the statute....
>
> Finding a general power to collect interim rates does not necessarily mean that such rates may be collected immediately from all customers. Terms on which the Secretary sells CRSP power are *governed by a contract*. The Secretary may not alter its terms unless the alteration is specifically contemplated by the contract or by statute. (Cites omitted).

Id. at 931-32 (emphasis added). To find that the interim rate increase was anticipated by the government and the plaintiff, the court looked to the relevant contract provision which stated:

> The rate schedule specified in this contract shall be subject to successive modification by the United States through the promulgation of superseding rate schedules. If at any time the United States promulgates a rate schedule superseding the rate schedule then in effect under this contract, it will promptly notify the contractor thereof. Said superseding rate schedule, as of its effective date, shall become effective unless the contractor...shall elect to terminate this contract....

Id. at 932.

Unlike the contract between SWPA and Sam Rayburn Cooperative, this contract does not specify that the rate increase shall be subject to the confirmation and approval of the FPC. Rather, it states that the superseding rate shall become effective "as of its effective date" unless the contractor terminates the contract. Hence, both the statute and the contract terms in *Colorado River* are substantially different from the statute and contract governing the resolution of the present case. However, *Colorado River* teaches that the terms for the sale of power are governed by contract, and the Secretary may

not alter its terms unless the alteration is specifically contemplated by the contract or by statute. Such alteration was not contemplated by the Flood Control Act. Neither is it contemplated by the Sam Rayburn contract. Rather, Section 4 of the Sam Rayburn-SWPA contract states when the new rate schedule is to be effective: "Any such new schedule of the compensation shall become effective . . . on the date specified in the order of the Federal Power Commission containing such confirmation and approval." Not only is the new schedule "subject to the confirmation and approval of the Federal Power Commission", but it is abundantly clear that it will not be effective until such approval on the date in the confirmation order. No interim rate increase is allowed by this contract as the rate increase cannot be effective until it has been confirmed by the FPC.

In the section entitled *Delegation*, it was explained that the approval function was transferred by Section 301(b) to the Secretary and subsequently delegated by Delegation Order No. 0204-33 to the FERC. To effectively apply the terms of the contract, the requirement of confirmation by the FPC is not discarded. As with the statutory construction, the contract must be interpreted to require confirmation by the FERC rather than the FPC.

A final contract question is whether the amendment to the Sam Rayburn contract executed on November 24, 1980, is valid.[15] That amendment, if enforceable, would allow the plaintiff to temporarily circumvent approval by the FERC and to enter the interim rate increase it desires. But this would be contrary to the statutory mandate. "It is well settled that a Government agency cannot contract in derogation of its statutory powers." *United States* v. *City and County of San Francisco*, 310 U.S. 16, 28 (1940). Accordingly, the Court concludes that since the amendment does not conform to the bifurcated process required by Section 5 and by the DOE Act, it is invalid.

Conclusion

In view of the foregoing, this Court concludes that the interim order issued by the Assistant Secretary for Resource Applications on April 12, 1979, was contrary to statutory and contractual authority. Hence, the interim rate order is declared invalid. Moreover, the Court concludes that the contract amendment of November 24, 1980, is likewise in derogation of statutory authority, and it is declared void. The true and effective date for the increased rate is the date when the FERC issued it [sic] final confirmation of the increased rate, January 8, 1981. Accordingly, this Court holds that the defendant is not liable for any monies claimed by the plaintiff to be owing during the period between June 1, 1979, the purportedly effective date of the interim rate increase, and January 8, 1981. Further, the Court orders that the plaintiff shall refund to defendant the amounts paid pursuant to the November 24, 1980, contract amendment. Defendant has not filed sufficient information to allow the Court to determine the exact amount to be refunded. Thus, defendant is hereby directed to submit within 15 days the required information whereby the Court may determine this amount.

DONE at Houston, Texas, on this the 19th day of August, 1982.

/s/ CARL O. BUE, JR.
United States District Judge

FOOTNOTES

[1] "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto." 16 U.S.C. §824(f) (1974).

[2] "(a)(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to -

(A) the Southeastern Power Administration;

(B) The Southwestern Power Administration;

(C) The Alaska Power Administration;

(D) the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;

(E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and

(F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 18, 1954, as amended by the Act of December 23, 1963." 42 U.S.C. §7152(a)(1) (Supp. 1981).

[3] Section 301; 42 U.S.C. 7151(b) which transfers the FPC's approval function to the Secretary of Energy; Section 402; 42 U.S.C. 7172(a)(1)(B) which transfers other rate making authority from the FPC to the FERC; and Section 302; 42 U.S.C. 7152(a)(1) which transfers all the functions of the Secretary of the Interior under 16 U.S.C. 825s to the Secretary of Energy.

[4] Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act contain identical language, and in part these provisions state:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. . . .

15 U.S.C. §7170 (1970); 16 U.S.C. §825h (1970).

[5] 6 FPC 407 (1947); 40 Fed. Reg. 1554 (January 8, 1975); 40 Fed. [Reg.] 29127 (July 10, 1975); and 42 Fed. Reg. 31292 (June 21, 1977).

[6] Morton v. Ruiz, 415 U.S. 199 (1974) (noting inconsistency with congressional purpose); Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958) (overruling a past agency practice found to be illegal under the statute); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939) (applying deference rule where administrative construction is not in conflict with statute construed); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1938) (holding that an administrative regulation, which operates to create a rule out of harmony with the statute authorizing it, is a nullity); Houghton v. Payne, 194 U.S. 104 (1904) (stating that administrative construction, however long continued, must yield to the positive language of the statutes construed); Orchard v. Alexander, 157 U.S. 372 (1895) (recognizing that no administrative practice can nullify an Act of Congress).

[7] *See* Note 1, *supra*, with accompanying text.

[8] The language of Section 6 of the 1937 Bonneville Power Act parallels Section 5 of the Flood Control Act. *See* 16 U.S.C. §832e (1976). However, this Court has discovered no cases under the authority of the Bonneville Act to allow the Administrator to implement rate increases without the confirmation and approval of the FPC.

[9] Section 4 of the Natural Gas Act states in part:

> (e) Whenever any such new schedule is filed the Commission shall have authority, . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, . . . may suspend the operation of such . . . schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; . . . the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. . . .

[10] Section 16 of the Natural Gas Act provides:

> The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

15 U.S.C. §717o (1976).

[11] The powers granted under the Federal Power Act are summarized as follows:

Section 4 of the Federal Power Act lists the general powers of the FPC: (1) to investigate and collect data on water resources; (2) to determine by investigation the cost and investment of a licensed hydro project; (3) to cooperate with state and other federal agencies in the investigation; (4) to make public the information secured by the investigations; (5) to issue licenses for dams, hydro projects, transmission facilities, and the like; (6) to issue permits to enable applicants for licenses to secure the data; and (7) to issue such orders as are in the public interest to conserve and utilize the resources of the region. 16 U.S.C. 797 (1976).

Section 301 deals with records and cost-accounting procedures to be followed by the public utility companies, and it provides further that the FPC shall at all times have access to these records. 16 U.S.C. 825 (1976).

Section 302 provides that public utilities may be required by the FPC to carry depreciation accounts and that the FPC may fix the proper rate of depreciation of the classes of property. 16 U.S.C. 825a (1976).

Section 306 allows any person to petition the FPC complaining of acts done or omitted to be done by the public utility in contravention of the various statutes. 16 U.S.C. 825e (1976).

The FPC under Section 307 may investigate any facts to determine whether there has been or is about to be a violation of a provision of the chapter. This section also gives the members of the FPC the power to issue subpoenae and to invoke the aid of court to enforce any subpoena. Further, this section describes the proceedings to be carried on before the Commission. 16 U.S.C. 825f (1976).

Section 308 governs the hearings and rules of procedure of hearings before the FPC. 16 U.S.C. 825g (1976). Section 309 is the grant of administrative power allowing the FPC to carry out the substantive provisions set forth in other parts of the chapter. 16 U.S.C. 825h (1976).

Section 312 concerns the FPC's reports and decisions which may be made available to the public. 16 U.S.C. 825k (1976). Section 313 describes the circumstances and requirements for rehearings by the FPC and for judicial review. 16 U.S.C. 825l (1976).

Section 314 deals with restraining orders that may be issued by the Commission; 16 U.S.C. 825m (1976), and Section 315 is authority for demanding a forfeiture by a public utility which does not respond to the subpoena issued or submit required information. 16 U.S.C. 825n (1976). Finally, Section 316 is authority for the FPC to impose penalties for persons who willfully and knowingly violate the provisions of the chapter. 16 U.S.C. 825o (1976).

The sections in the Natural Gas Act are quite similar to those of the Federal Power Act, and they can be listed in a more condensed manner.

Section 8 deals with accounts and records to be kept by the gas companies; 15 U.S.C. 717g (1976). Section 9 involves the rates of depreciation of property; 15 U.S.C. 717h (1976); Section 13 is the provision allowing complaints

to be filed with the FPC where a person alleges a violation by a gas company; 15 U.S.C. 7171 (1976); Section 14 allows for the investigations of possible violations by the FPC; 15 U.S.C. 717m (1976).

Section 15 states the rules of procedure and manner of conducting hearings before the FPC; 15 U.S.C. 717n (1976); Section 16 gives administrative authority to the FPC to carry out the substantive duties outlined in other sections of the chapter; 15 U.S.C. 717o (1976); and finally, Section 17 provides that the FPC will cooperate with the state commissions in matters involving the transmission and sale of natural gas. 15 U.S.C. 717p (1976).

[12] Section 302 transfers the functions of the Secretary of Interior to the Secretary of Energy as discussed in the preceding section, *Statutory Authority*.

[13] The Petroleum Marketing Practices Act at issue in United States v. Exxon Corp., 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980), directed the Secretary of Energy, along with other appropriate agencies, to conduct a study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies. 15 U.S.C. § 2841 (Supp. 1979).

The Entitlements Program construed in Atlantic Richfield Co. v. U. S. Dept. of Energy, 500 F. Supp. 1301 (E.D. Pa. 1980), *aff'd*, 655 F.2d 1118 (Emer. Ct. App. 1981), conferred upon the DOE the authority to allocate and control the price of crude oil and petroleum products sold by privately owned oil companies. 15 U.S.C. §753(a) (1976).

[14] Any sale of electrical power or lease of power privileges, made by the Secretary [of Interior] in connections with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will product [sic] power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per cent per annum, and such other fixed charges as the Secretary deems proper... Cf [sic] U.S.C. §485h(c) (1964).

[15] The amendment states in full:

> Section 3. *Compensation to SWPA for Hydro Power and Energy.* (a) Sam Dam Co-op shall compensate SWPA each month for hydro power and energy purchased under this Contract at the rates and under the terms and conditions set forth in the applicable rate order covering this Contract, a copy of which is attached to this Contract identified as Exhibit "2", and by this reference made a part hereof, whether in effect on an interim basis or as finally confirmed and/or approved by the appropriate authority also having responsibility to so confirm and/or approve rates pursuant to the Department of Energy Organization Act. It is understood and agreed that the

rates and/or terms and conditions set forth in the said rate order may, upon confirmation and/or approval by the appropriate authority having responsibility to so confirm and/or approve rates pursuant to the Department of Energy Organization Act, and whether on an interim basis or as finally confirmed and/or approved, be increased, decreased, modified, or superseded, at any time, and from time to time, and that if so increased, decreased, or superseded, the rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale under this Contract of hydro power and energy in accordance with and on the effective date specified in the order of the appropriate authority.

See Defendant's Brief, Appendix B.

APPENDIX G

UNITED STATES of America

v.

TEX-LA ELECTRIC COOPERATIVE, INC.

UNITED STATES DISTRICT COURT
E. D. LOUISIANA
[524 F. SUPP. 409]

Civ. A. No. 80-2813.

Sept. 9, 1981

OPINION

ARCENEAUX, District Judge.

At the preliminary pre-trial conference held in this matter, it was stipulated by both parties that there are no disputed issues of material fact. Accordingly, the Court's decision relative to the parties' cross motions for summary judgment is dispositive of the case.

Oral argument was heard on April 22, 1981, and the parties were allowed to further supplement their numerous pre-trial memoranda.

Having reviewed the applicable law, the facts of the case, and the comprehensive memoranda submitted by both parties, IT IS ORDERED that the summary judgment of defendant Tex-La Electric Cooperative, Inc. (Tex-La) be GRANTED, and the corresponding motion of plaintiff be DENIED.

BACKGROUND

Section 5 of the 1944 Flood Control Act, 16 U.S.C. § 825s[1]

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[1] The 1944 Flood Control Act, Section 5, reads as follows:

"Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the

establishes the governmental functions which are to be exercised in the sale of federal hydropower from reservoir projects constructed by the Army. They include:

1) the transmission and disposal of power and energy;
2) the formulation of appropriate rate schedules; and
3) the confirmation and approval of rates.

From 1944 to 1977, the first two functions were exercised by the Secretary of the Interior, while the third was under the control of the Federal Power Commission (FPC).

In 1977, the Department of Energy Organization Act (DEOA), 42 U.S.C. § 7151 *et seq.*,[2] transferred the Depart-

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most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts."

16 U.S.C. § 825s.

[2] Section 301(b) of the 1977 Department of Energy Organization Act reads as follows:

"(b) Except as provided in subchapter IV of this chapter, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence."

42 U.S.C. § 7151(b).

Section 302 of the 1977 Department of Energy Organization Act provides:

ment of the Interior's power marketing responsibilities and the FPC's rate confirmation and approval functions under the Flood Control Act to the Department of Energy. In December of 1978, the Secretary of Energy delegated his authority to establish rates under the Flood Control Act to the Assistant Secretary for Resource Applications. Delegation Order No. 0204-33, 43 Fed. Reg. 60636-37 (1978).[3] By the same order, the Secretary delegated authority for *final* confirmation of rates to the Federal Energy Regulatory Commission (FERC).

"(a)(1) There are hereby transferred to, and vested in, the Secretary all functions of the Secretary of the Interior under section 825s of Title 16, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to—

"(A) the Southeastern Power Administration;

"(B) the Southwestern Power Administration;

"(C) the Alaska Power Administration;

"(D) the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Project Act of 1937 and the Federal Columbia River Transmission System Act;

"(E) the power marketing functions of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant facilities; and

"(F) the transmission and disposition of the electric power and energy generated at Falcon Dam and Amistad Dam, international storage reservoir projects on the Rio Grande, pursuant to the Act of June 18, 1954, as amended by the Act of December 23, 1963.

"(2) The Southeastern Power Administration, the Southwestern Power Administration, the Bonneville Power Administration, and the Alaska Power Administration shall be preserved as separate and distinct organizational entities within the Department. . . ."

42 U.S.C. § 7152(a).

[3] Delegation Order No. 0204-33, 43 Fed. Reg. at pp. 60636-37 (1978), which in part reads as follows:

"1. There is hereby delegated to the Assistant Secretary for Resource Applications the authority to develop, acting by and through the administrators, power and transmission rates for the power marketing administrations, and the authority to confirm, approve, and place in effect such rates on an interim basis, for such period or periods as he may provide, subject to refund with interest as determined by the Federal Energy Regulatory Commission in accordance with Section 3 hereof. . . ."

The latter was created in 1977 as an independent entity in the Department of Energy.

The Southwestern Power Administration (SWPA) became, by order of the Department of the Interior, the agency responsible for the marketing of reservoir power in the southwestern region of the United States. This region includes Texas and Louisiana. A federal study, completed in 1978, determined that costs were not being recovered for SWPA's sales of hydroelectric power. On March 1, 1979, the Assistant Secretary for Resource Applications issued a rate order which increased power and energy rates for SWPA's customers, and placed the new rates into effect on an interim basis, subject to final confirmation by FERC. Order Confirming, Approving and Placing Rates in Effect on an Interim Basis, Rate Order No. SWPA-1 March 1, 1979, 44 Fed. Reg. 13068.

Tex-La, one of those customers, has refused to pay the interim rates until they receive final confirmation and approval by FERC. As a result of this refusal, plaintiff instituted this action pursuant to 28 U.S.C. § 1345. Jurisdiction and venue are uncontested.

There are two Tex-La/U.S. power sale contracts which are pertinent. The first, Contract No. 14-02-001-864 (# 864),[4] was

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[4] Contract No. 864, as originally confected, provides in pertinent part at Section 2:

> "Tex-La shall purchase, receive, and compensate the Government for firm power capacity and associated energy purchased under Section 1 at the rates and in accordance with the terms and conditions of Rate Schedule 'F-1', a copy of which is attached hereto identified as Exhibit '1', and by this reference made a part hereof. It is understood and agreed that the said Rate Schedule 'F-1' may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded at any time and from time to time, and that if it is so modified, amended, or superseded, the new rate or rates shall thereupon become effective and applicable to the purchase and sale of firm power capacity and associated energy under this agreement *in accordance with and on the date of the order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

The above contract was amended on January 5, 1968, adding a new Section 2:

entered into in 1958, and provides for the sale of "firm SWPA system power". This contract contains the provision that rates may be increased or decreased subject to confirmation and approval by the FPC. The second contract, Contract No. 14-02-0001-921 (# 921),[5] entered into in 1960, provides for the

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"(b) At any time after December 20, 1972, and from time to time thereafter, but not more often than every five years, the rates for the sale of firm power capacity and associated energy, as set forth in Subsection (a), above, may be increased or decreased by the Government, *subject to the confirmation and approval of the Federal Power Commission*. Any such new schedule of rates shall become effective and applicable to the purchase and sale of firm power capacity and associated energy under Section 1, hereof, *in accordance with and on the date specified in the order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

[5] Contract No. 921 pertains to the sale of four specific types of power. The sections pertaining to compensation for each of these sales read as follows:

(a) Article I, Section 4:

"At any time after May 31, 1965, and from time to time thereafter, but not oftener than once every five years, the schedule of compensation for the purchase and sale of Narrows Dam Power and Energy set forth in Subsections (a) and (b) of Section 3, above, may be reviewed and redetermined by SWPA and, *with the confirmation and approval of the Federal Power Commission*, modified, amended, or superceded. If so modified, amended, or superceded, the new schedule of compensation shall become effective and applicable to the purchase and sale of Narrows Dam Power and Energy under this Article I in accordance *with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

(b) Article II, Section 5:

"(a) Tex-La shall compensate SPA each month for Peaking Power Capacity and for Peaking Energy scheduled for delivery during the preceding month at the rates set forth in Rate Schedule "P-1", a copy of which is attached to this Agreement identified as Exhibit "1", and by this reference made a part hereof. It is understood and agreed that the rates set forth in the said Rate Schedule "P-1" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time and from time to time, and that if so modified, amended, or superseded, the new rates shall thereupon *become effective and applicable to the sale of Peaking Power Capacity and Peaking Energy under this Article II in accordance with and on*

purchase and sale of other energy amounts and requires that any modification of an existing rate be "in accordance with and on the effective date specified in the final order of the FPC containing such confirmation and approval."

PLAINTIFF'S CONTENTIONS

In its simplest outlines, plaintiff's argument is as follows:

1) The interim rate increase was necessary for compliance with the terms of the Flood Control Act; and,

2) Such an increase is authorized under the contracts extant between the parties, as well as by the terms of the DEOA. The DEOA grants to the Secretary for the Department of Energy the authority to modify and establish power rates for energy generated by federally owned reservoir projects and also authorizes him to establish rate modification on an interim basis.

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the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval." Emphasis added.

(c) Article III, Section 5:

"(b) It is understood and agreed that the rates set forth in the said Rate Schedule "EE" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time and from time to time, and that if so modified, amended, or superseded, the new rate shall thereupon *become effective and applicable to the sale of Excess Energy under this Article III in accordance with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

(d) Article IV, Section 3:

"(b) It is understood and agreed that the rates set forth in the said Rate Schedule "IC" may, *with the confirmation and approval of the Federal Power Commission*, be modified, amended, or superseded, at any time, and from time to time, and that if so modified, amended, or superseded, the new rates shall thereupon become effective and applicable to the sale of Interruptible Capacity and energy under this Article IV *in accordance with and on the effective date specified in the final order of the Federal Power Commission containing such confirmation and approval.*" Emphasis added.

The underpinning asserted by plaintiff for the last tenet arises from the administrative odyssey which the Flood Control Act has undergone. As stated above, that act originally provided that rates for energy sale beeome effective upon confirmation and approval by the FPC. When that body was abolished in 1977, its Flood Control Act functions were transferred to the Secretary of Energy. While some FPC functions were transferred to FERC, the authority to confirm and approve rates under Section 5 of the Flood Control Act was not. Rather, that authority went directly to the Secretary of Energy. He is now vested with the authority to both establish and approve rates.

Plaintiff also asserts that interim rate authority is inherent in the Secretary's general rate-making authority. Plaintiff cites *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942), as evidence of the FPC's analagous authority to impose interim rates under the Natural Gas Act. The Court's decision in that case was based upon its conclusion that the authority to order rate decreases on an interim basis is implicit in the express authority to set rates.

Plaintiff also places much reliance on *Pacific Power & Light Co.* v. *Duncan, et al.*, 499 F.Supp. 672 (D.Or.1980) and *The Montana Power Co., et al.* v. *Edwards, et al.*, Civil Action # 80-842 PA. (D.Or. May 19, 1981). Plaintiff claims that these two cases, arising in the same district court in Oregon, "expressly affirmed the Secretary's interim rate authority". *The Pacific Power & Light Co.* case concluded that the DEOA transferred the Department of the Interior's rate-making authority, as well as the FPC's rate approval functions, to the Department of Energy. Plaintiff contends that this conclusion supports its contention that interim rate authority is inherent in general rate-setting authority. Plaintiff also points to rules of statutory construction for additional support of its "inherency" argument.

Plaintiff candidly describes the financial dilemma facing the Department of Energy, which prompted the imposition of interim rates. FERC's review of any application for a permanent increase will be a lengthy process; one result of any such delay would be the "erosion" of the DOE's power and marketing agencies' financial position. Since "there is no statutory limitation on the Secretary's general rate-making authority", and "the use of interim rates is an essential element of the rate-setting process", the Secretary's present course of action is, plaintiff urges, legal and proper.

Plaintiff also concludes that the imposition of interim rates is permitted by the Tex-La contracts. Since those contracts refer to FPC authority, and since that entity no longer exists and has been effectively replaced by the Department of Energy ("DOE"), the DOE is properly "constructively" substituted for the FPC.

In response to defendant's arguments, discussed *infra*, plaintiff denies that FERC has, by law, assumed the FPC's confirmation function. Plaintiff also disputes defendant's contention that this rate order is the first governmental exercise of the imposition of interim rate authority. It cites to other instances of FPC rate modification on an interim basis, which modifications allegedly established an interim rate procedure. Instead of altering that procedure, Congress provided, by enacting the DEOA, "additional statutory support for the utilization of the interim rates".

In reference to defendant's argument that the increase in question would result in contractual breach, plaintiff reiterates that the DOE is the FPC successor. The fact that FERC possesses final confirmation authority does *not*, plaintiff argues, preclude imposition of interim rates, nor does it "resurrect in FERC the FPC's rate confirmation authority". Plaintiff then disputes defendant's reliance on *Arkansas Power & Light Co., et al.* v. *Schlesinger, et al.*, Civil Action #79-1263 (D.D.C., October 20, 1980), contending that this

case is distinguishable. This distinction arises, plaintiff contends, because the contracts involved in *Arkansas Power* specifically prohibited rate increases relative to a predetermined ceiling. No such prohibition appears in the contracts at issue here.

Plaintiff also emphasizes that the Secretary's order delegating his authority to establish interim rates to the Assistant Secretary for Resource Applications, and delegating authority for final confirmation of those rates to FERC, was proper, since the Secretary is, by statute, empowered to delegate authority as may be necessary to effectuate the purposes of the DEOA. Yet those delegations do not diminish the Secretary's interim rate authority. The authority delegated to FERC did *not* reestablish in FERC the FPC's final confirmation authority.

Plaintiff also cites this Court to the 1981 decision of the District Court for the District of Columbia in *Colorado River Energy Distributors Ass'n, et al.* v. *Lewis, et al.*, 516 F.Supp. 926 (1981). Plaintiff recites the factual similarities extant between that case and this one, and summarizes that Court's conclusions:

> 1) that the Secretary for the DOE has authority to establish interim rates; and,
>
> 2) that the contracts at issue do not preclude the interim rate procedure.

DEFENDANT TEX-LA'S CONTENTIONS

Defendant contends that the fine-line delineations urged by plaintiff as to "interim" versus "final" rate confirmation and approval are untenable. Section 5 of The Flood Control Act speaks merely to "confirmation and approval" before a rate becomes effective. Thus, no rate schedule may be implemented *before* confirmation and approval.

The crux of defendant's attack on plaintiff's position, however, is that, while the Secretary of Energy was empowered to delegate the FPC final confirmation and approval function to the FERC, he was *not* empowered to delegate authority to approve and confirm rates on an interim basis to the Assistant Secretary of Energy for Resource Applications inasmuch as the FPC was not empowered to implement interim rates. Any such delegation would also violate the contracts' specific provisions relative to rate modification.

Defendant reads Section 402 of the DEOA as requiring the participation of FERC in rate confirmation and approval because 1) no "re-delegation" or cancellation of FERC's authority has been made in favor of the Secretary of Energy, and 2) Section 402(e) states that the FERC shall have jurisdiction over matters referred to it pursuant to Section 404. Section 404 requires that the Secretary refer to the FERC any function within the FERC's jurisdiction which may significantly affect that function. Setting rate schedules for wide areas is one such function.

In attacking plaintiff's inherency argument, defendant looks to the language of the Flood Control Act as evidence that no "plenary grant" of rate-making power exists. Rather, it urges that that section specifically negates such a conclusion. The statute also fails to evidence any provision for "interim" (as opposed to final) confirmation and approval. The language of Section 5 of the Flood Control Act is contrasted with various federal and state statutes which either clearly authorize interim rate setting powers *or* contain language sweeping enough to make an inherency argument plausible.

Defendant also attacks plaintiff's proffered contractual construction. The contract's terms do not permit the setting of interim rates, inasmuch as *any* rate modification is subject to FPC "final" approval. Defendant views the *Arkansas Power & Light Co.* decision as standing for the proposition that a contract valid when entered into cannot be modified by the

Government when it becomes politically and/or economically disadvantageous.

Defendant seeks to discredit the *Pacific Power & Light* decision by stating that the Court failed to analyze the Flood Control Act's rate-making function, and failed to distinguish between making a rate final and making it effective; the latter occurs only after confirmation and approval.

Defendant also attacks the plaintiff's characterization of the Secretary's rate-making authority as a single rate-making function. Rather, several such functions exist under the various acts (Natural Gas Act, Federal Power Act, Flood Control Act), and each is to be interpreted according to its own "substantive standard".

While defendant concedes that the two contracts' language was drafted so as to incorporate the requirements of Section 5 of the 1944 Flood Control Act, and that these provisions should be interpreted to reflect statutory amendment, no statutory change has occurred which would make a rate—interim or otherwise—effective without confirmation and approval.

LAW

This Court is not convinced that the terms of the two contracts in question permit a rate increase to become effective prior to confirmation and approval of that rate by either the FERC, pursuant to Delegation Order 0204-33, or by the Secretary of Energy, under the DOE Act, § 301(b).

The language of the two contracts is critical to the above determination. Contract # 864, both in its initial and amended forms, follows Section 5 of the 1944 Flood Control Act, stating that a new rate will become effective "on the date of the order of the Federal Power Commission containing such confirmation and approval". The 1968 amendment of this contract goes even farther, making rate change "subject to the confirmation

and approval of the Federal Power Commission". Contract # 961 also contains, in those provisions relative to rate modification, language tracking the language of Section 5 of the 1944 Flood Control Act—i.e., that modification be "with the confirmation and approval of the Federal Power Commission ... in accordance with and on the date specified in the final order of the Federal Power Commission containing such confirmation and approval". This contractual reference to the necessity of a "final order of the Federal Power Commission" containing approval of the rate modification may not be "read out" by the Department of Energy.

This Court has not been cited to any controlling precedent indicating that interim rate implementation has occurred in past agency action under Section 5 of the Flood Control Act. Interim rate approvals have occurred under the 1938 Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, ("NGA") and the 1935 Federal Power Act, 16 U.S.C. § 793 *et seq.*, ("FPA"), but not under Section 5 of the Flood Control Act. The FPA and the NGA differ from the 1944 Flood Control Act. The FPA and NGA regulate investor-owned companies and thus do not regulate state or federal governmental entities. The Flood Control Act, on the other hand, regulates federal power marketing agencies. These entities are, by function and definition, distinguishable.

It is well settled that consistent past agency practice in interpretation and application of a statute within the sphere of an agency's general function is of significance. *United States* v. *Alabama Great Southern Railroad Co.*, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134 (1892); *Environmental Protection Agency* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct 295, 307, 66 L.Ed.2d 268 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 18, 85 S.Ct. 792, 802, 13 L.Ed.2d 616 (1965). This Court finds guidance in the 30 year practice of the Secretary of the Interior in seeking final confirmation and approval of rates by the FPC before they are made effective. Where the abstention of

agency action in a given area is suddenly abandoned, based on the argument that new authority has been discovered in the original statute, the existence of the newly claimed authority is frequently denied. *National Labor Relations Board* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 289, 94 S.Ct. 1757, 1769, 40 L.Ed.2d 134 (1974); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514, 69 S.Ct. 1251, 1260-1261, 93 L.Ed. 1499 (1949).

The three Section 5 functions referred to above (transmission and disposal, formulation of rate schedules and confirmation and approval) were not altered or enlarged by subsequent statutory amendment. While the enactment in 1977 of the DEOA effected the consolidation of these three rate-making functions in the Secretary of Energy, these functions were not thereby expanded or altered. This transfer, contained in Sections 301(b) and 302 did not extinguish any restraints on the exercise of these functions or enlarge it. The interim rates at issue here have not been confirmed and approved by the Secretary of Energy or by the FERC. Yet it is those agency actions which would be required to constitute final rule making.

The requirements for rule making by the Secretary of Energy appear in Section 501 of the DEOA, 42 U.S.C. § 7191 (Supp. III, 1979). That section, in pertinent part, reads as follows:

> If any provision of any Act, the functions of which are transferred, vested or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

42 U.S.C. § 7191(a)(1). Thus, the Secretary is bound in the promulgation of new rules by the procedures set forth in those acts whose functions were transferred to him.

Inasmuch as the Secretary is restrained from making a rate effective prior to its confirmation and approval, his designees

are similarly restrained. The March 1, 1979 DOE order implementing rates against Tex-La on an interim basis may not be construed as a final order, nor did the Secretary's Delegation Order No. 0204-33, 43 Fed. Reg. 60636-37 (1978) create *interim* rate implementation authority. If the Secretary of Energy had acted to confirm and approve the proposed rate, he would have exercised the function transferred to him by the DEOA, Section 301(b). No additional approval and confirmation by FERC would be necessary after such final action by the Secretary. However, an *interim* rate, approved by the Assistant Secretary for Resource Applications must receive final confirmation and approval by FERC. No such final agency rule making action has occurred.

This Court has reviewed the recent district court cases cited to it by movers, and finds persuasive the reasoning of the *Arkansas Power & Light Co.* decision, *supra*. There, as here, the Government entered into a valid commercial contract. It is well settled that it is then bound by the terms of that contract. See *The Sinking Fund Cases*, 99 U.S. 700, 719, 25 L.Ed. 496 (1879) which holds:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much a repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen.

Id. at 719.

The exception to this rule will arise when the contract's terms: 1) are in derogation of statutory authority (*Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167, n.17 (D.C.Cir.1974)); 2) affect the United States in the exercise of its paramount authority (*Larionoff* v. *United States*, 533 F.2d 1167, 1179 (D.C.Cir.1976)); or, 3) implicate the United States in matters of moral turpitude (*United States* v. *Acme Process Equipment Co.*, 385 U.S. 138, 145, 87 S.Ct. 350, 355, 17 L.Ed.2d 249 (1966)). Another exception would arise should

the contract be invalid when confected. *Cf. Grand River Dam Authority* v. *National Gypsum Co.*, 352 F.2d 130 (10th Cir. 1965). There is no challenge here, however, to the validity of the contracts in issue, nor are the contracts subject to attack under any of the other grounds set forth above.

As stated in the *Arkansas Power & Light Co.* case:

> The dictum in *Associated Electric Cooperative* is not authority for the proposition that the Government can alter or repudiate a contract which was valid at the time it was entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legal history cited to this Court indicates that Congress intended the Flood Control Act to give the Government authority to unilaterally alter existing contracts.

Id. at *slip op.* 4.

The Court also observed at n.3 that the above-quoted language is consistent with the action taken by the FPC in 1957 when the Secretary of the Interior requested approval of a new rate, which rate was not in accordance with a contract's rate schedule. The FPC, stating that it had no authority to determine that rates set in a valid contract are no longer effective, denied the request.

The legislative history of the 1977 DEOA does not indicate that the rate implementation procedure, whether on an interim or other basis, has been altered by transfer of FPC function to the Secretary of Energy. The DEOA Act Conference Report, H.R. Rep. No. 95-539, 95th Cong., 1st Sess. 65 (1977), U.S.Code Cong. & Admin. News, p. 854, states:

> The Conference substitute transfers to the Secretary all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402 of the Bill.*

* Under Section 402(a)(1), Federal Power Commission rate-making functions under the Natural Gas Act and the Federal Power Act were exclusively vested by the Conference Bill in the Federal Energy Regulatory Commission.

This Court has been presented with no precedent for the argument that the FPC's Section 5 rate-making function was a plenary one, imbued with some unarticulated interim rate-making power, nor that the transfer of the FPC function somehow effected such a transformation.

While delegation of final confirmation, and approval authority to the FERC would be appropriate under the DEOA, the Secretary's attempt to delegate interim rate approval and confirmation to the Assistant Secretary of Energy for Resource Applications, pending final confirmation by FERC, is not. Such authority was never included in the FPC function under Section 5 of the Flood Control Act, nor was it contained in the DEOA.

The Court is cognizant of the fact that the Secretary of Energy is empowered by Section 301 to exercise certain administrative powers transferred to the FERC by Section 402(a)(2) of the DEOA, 42 U.S.C. § 7172(a)(2) (Supp. III 1979). These powers are simply administrative powers which exist under the FPA and NGA. Contrary to the decision, however, in *Pacific Power & Light Co., supra*, this Court does not believe that any NGA or FPA administrative powers enable the Secretary of Energy to implement, under Section 301(b) and 402(a)(2) of the DEOA, interim rates under the 1937 Bonneville Project Act ("BPA") 16 U.S.C. § 832 *et seq.*[7] Indeed, it would seem clear that any such power would not be administrative, but is clearly substantive. A mere grant of administrative power relative to a particular act will not create plenary rate making power under a different statute. Interim imposition of rates under both the NGA and FPA, however, is an authorized substantive action. *See* 15 U.S.C. § 717(c) and 16 U.S.C. § 824(d). *See also New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C.Cir.

[7] The Bonneville Project Act is relevant to the issues here, because the rate schedule implementation provisions of the Flood Control Act were patterned after those in the Bonneville Project Act. Conference, H. R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944).

1972); *aff'd*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974). Under Section 5 of the Flood Control Act, however, no substantive statutory foundation exists upon which the Secretary of Energy may implement interim rates.

The plaintiff's argument that the interim imposition of rates is "inherent" in rate making power is unsupported by the language of Section 5 of the Flood Control Act and the DEOA. This Court has reviewed those state and federal court cases cited to it by the parties in which interim implementation of rates was allowed. *See, e.g., Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 83 S.Ct. 211, 214, 9 L.Ed.2d 199 (1962); *Natural Gas Pipeline Co., supra; Sellers* v. *Iowa Power & Light Co.*, 372 F. Supp. 1169, 1170-1171 (S.D.Iowa 1974). But the statutes at issue in these cases specifically provided for interim rate implementation.[8] Such a specific grant of interim rate-making power does not support plaintiffs "inherency" argument relative to Section 5 of the Flood Control Act. The Secretary of Energy was given specific rate-making powers pursuant to the 1944 Flood Control Act. The transfer of the rate design and confirmation functions did not work, as the plaintiff suggests, some sort of magic merger whereby the Secretary acquired the authority to impose interim rates. No merger of function occurred, but rather only a merging of the exercises of function.

The parties agree that the contractual provisions at issue here should be interpreted to reflect statutory amendment.

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[8] The Iowa statute at issue in *Sellers, supra*, reads as follows:

> "However, a public utility *shall have the right at any time after said rates, charges, schedules or regulations have been suspended for ninety days to place in effect* any or all of such suspended rates, charges, schedules or regulations *by filing with the commission a bond* or other undertaking approved by the commission conditioned upon the refund in a manner to be prescribed by the commission of any amounts collected thereunder *in excess of the amounts which would have been collected under rates, charges, schedules, or regulations finally approved by the commission* . . ." Emphasis added.

Iowa Code Ann. § 476.6 (Supp.1980).

However, there has been no amendment of the rate-making function of Section 5, which function mandates that a rate will become effective only upon confirmation and approval. Nor is "confirmation and approval" of a rate a mere procedural step, as the plaintiff would have this Court find. Rather, "confirmation and approval" is a fundamental function under Section 5 rate making; it constitutes the substantive review whereby a proposed rate is made effective after its design is scrutinized.

Plaintiff relies upon the *Colorado River Energy Distributors* decision, *supra*, in which the Secretary's imposition of an interim rate prior to final approval was upheld. Again, however, this finding was reached relative to statutes which differ from the 1944 Flood Control Act. The statutes at issue there were the Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.*, the Reclamation Project Act of 1939, 43 U.S.C. § 485 *et seq.* and the Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 *et seq.* While all of these statutes, as well as the Flood Control Act, authorize the sale of hydroelectric power generated by federally owned facilities, the similarities stop there.

Section 9(c) of the 1939 Reclamation Project Act, for example, reads in pertinent part:

> Any sale of electrical power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper . . . .

43 U.S.C. § 485h(c)[9]. The Court held that this language created

[9] Section 9(c) in its entirety reads as follows:

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Pro-*

a plenary grant of rate-making power (516 F.Supp. at 930-931). Section 5, however, contains no such broad, sweeping language.

The *Colorado River* decision goes on to state that:

> Finding a general power to collect interim rates does not necessarily mean that such rates may be collected immediately from all customers. The terms on which the Secretary sells CRSP power are governed by a contract.

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vided, that any such contract either (1) shall require repayment to the United States over a period of years not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3 1/2 per centum per annum, *if the Secretary determines* an interest charge to be proper, of an appropriate share as *determined by the Secretary* of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates *as in the Secretary's judgment* will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges *as the Secretary deems proper*, and shall require the payment of said rates each year in advance of delivery of water for said year. *Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: Provided further*, that in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part of loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges *shall be in addition and alternative to any authority in existing laws relating to particular projects*. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, *in the judgment of the Secretary*, it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. § 485h(c) (1976). Emphasis added.

> The Secretary may not alter its terms unless the alteration is specifically contemplated by the contract or by statute.

At 932.

The contract at issue in that case and those present here are also distinguishable. The *Colorado River* contract reads as follows:

> The rate schedule specified in this contract shall be subject to successive modification by the United States through the promulgation of superseding rate schedules. If at any time the United States promulgates a rate schedule superseding the rate schedule then in effect under this contract, it will promptly notify the contractor thereof. Said superseding rate schedule, as of its effective date, shall become effective unless the contractor ... shall elect to terminate this contract ...

At 932.

But the restraints evident in the contractual provisions at issue here do not permit the result reached in the *Colorado River* decision.[10] The Section 5 confirmation and approval function, incorporated into the contracts at hand, cannot be unilaterally abrogated. While rate increases designed to recover costs arising from changed circumstances must be ultimately recoverable under the terms of Section 5, the increases may only be accomplished in the manner provided by the statute.

The DEOA does *not* create a new plenary rate-making power in the Secretary of Energy under Section 5 of the Flood Control Act, nor does it confirm an existing one. A transfer of existing rate design and implementation authority to the Secretary of Energy did occur; however, the implementation powers transferred are no greater than those which existed prior to the transfer.

Final rate confirmation and approval by the entity exercising that function is mandated by the contracts at issue. Thus,

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[10] *See* n.4, 5, *supra*.

these rate proposals are "subject to" final confirmation and approval by the rate-making entity, which confirmation and approval has not occurred. Thus, the Motion for Summary Judgment of defendant Tex-La Cooperative, Inc. is GRANTED, and the Cross Motion of plaintiff United States of America is DENIED.

Judgment shall be entered accordingly.

APPENDIX H

(1) CITY OF FULTON, (2) City of Lamar, (3) City of Thayer, (4) City of Piggott

v.

The UNITED STATES.

[680 F.2d 115]

No. 509-80C.

United States Court of Claims.

May 19, 1982.

Before KASHIWA, KUNZIG,* and SMITH, Judges.

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

SMITH, Judge.

This contract case comes before the court on the parties' cross-motions for summary judgment. Plaintiffs are four cities (Cities) in Missouri and Arkansas which entered into contracts with the Southwestern Power Administration (SWPA) of the Department of the Interior for the purchase of electric power pursuant to section 5 of the Flood Control Act of 1944.[1] In 1979 SWPA announced an interim rate increase which plaintiffs contend violated section 5 of the Flood Control Act and breached their contracts with the Government. The Government, in turn, argues that the interim rate increase was necessary to cover rapidly rising operating costs and was

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* Judge Robert L. Kunzig participated in the oral argument and agreed to the determination in this case before his death on February 21, 1982.

[1] 16 U.S.C. § 825s (1976 & Supp. III 1979).

adopted in compliance with federal statutes and the contracts with the Cities. We reject the Governments' position, and consequently, grant plaintiffs' motion for summary judgment and deny defendant's cross-motion for summary judgment. Plaintiffs are awarded judgment on the issue of liability on their breach of contract claims.

I.

In enacting section 5 of the Flood Control Act of 1944, Congress authorized the Secretary of the Interior to transmit and dispose of electric power generated at reservoir projects under the control of the Department of the Army. Section 5 requires that such power be provided "at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission."[8] For several years the

[8] The full text of section 5 of the Flood Control Act, 16 U.S.C. § 825s (1976 & Supp. III 1979), provides:

> "Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, *the rate schedules to become effective upon confirmation and approval by the Federal Power Commission*. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts." (Emphasis supplied.)

Cities received all or part of their electrical power from the Government, pursuant to contracts entered into between plaintiffs[3] and the SWPA.

In 1977, Congress enacted the Department of Energy Organization Act (DEOA),[4] which abolished the Federal Power Commission (FPC) and transferred the functions of the Secretary of the Interior under the Flood Control Act to the Secretary of Energy.[5] Pursuant to the DEOA, the Secretary of Energy by published order[6] delegated to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve rates on a final basis which was originally conferred upon the FPC. In the same order the Secretary of Energy also delegated to the Assistant Secretary for Resource Applications[7] the authority to confirm and place in effect on an interim basis rates for electrical power sold by the SWPA. On March 1, 1979, the Assistant Secretary confirmed the rate increase at issue in this case, effective April 1, 1979, on an interim

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[3] For purposes of this suit, four contracts between plaintiffs and SWPA are at issue: (1) City of Fulton contract, entered into on April 29, 1977, and effective until May 31, 1987; (2) City of Lamar contract, entered into on April 29, 1977, and effective until May 31, 1987; (3) City of Thayer contract, entered into on April 15, 1963, and effective until June 30, 1983; and (4) City of Piggott contract, entered into on June 21, 1965, and effective until June 30, 1987.

[4] 42 U.S.C. §§ 7101-7352 (Supp. III 1979).

[5] *See* note entitled "Transfer of Functions" accompanying section 5 of the Flood Control Act, 16 U.S.C. § 825s (Supp. III 1979), which states:

> "The functions of the Secretary of the Interior under this section were transferred to the Secretary of Energy by section 7152(a)(1) of Title 42, The Public Health and Welfare.
>
> "The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare."

[6] Delegation Order No. 0204-33, 43 Fed. Reg. 60,636 (1978).

[7] A later amendment to the original delegation order substituted the Assistant Secretary for Conservation and Renewable Energy for the Assistant Secretary for Resource Applications.

basis, subject to final confirmation by the FERC. Plaintiffs have paid the increased rate since April 1, 1979, and now seek to recover a money judgment from the Government in the amount of the rate increase. Jurisdiction is proper in this court under 28 U.S.C. § 1491 (Supp. III 1979). The central issue in the case before us is whether the interim rate increase authorized by the Assistant Secretary breached plaintiffs' contracts with the SWPA. We conclude that there was such a breach.

II.

Because the suit before us alleges breach of express contracts between plaintiffs and the SWPA, our inquiry necessarily begins with an analysis of the terms of the contracts. As stipulated by the parties, the relevant portion of the Fulton-SWPA contract pertaining to changes in rates and charges provides:

> It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule "F-1", with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the *new rates* and/or terms and conditions *shall thereupon become effective* and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract *in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval.* [Emphasis supplied.]

As stipulated by the parties, the relevant portion of the Lamar-SWPA contract exactly follows the Fulton-SWPA contract. Although worded slightly differently, the Thayer-SWPA and Piggott-SWPA contracts contain language virtually identical

to that set forth in the Fulton-SWPA contract quoted above.[8]

An examination of each of the four Cities' contracts with the SWPA reveals that each contract provided for periodic rate increases to be effective upon the order of the FPC confirming and approving such increases. However, by the time the interim rate increases now at issue were made effective, the FPC had been abolished by the DEOA. The Government seizes upon the abolition of the FPC and the concurrent transfer of its administrative functions in formulating an ingenious defense to plaintiffs' breach of contract claim.

The Government asserts that a specific provision of the DEOA appearing at 42 U.S.C. § 7151(b), confers upon the Secretary of Energy the power to perform former *FPC* functions, including rate approval and confirmation under section 5 of the Flood Control Act. 42 U.S.C. § 7151(b) (Supp. III 1979) provides:

> (b) Except as provided in subchapter IV of this chapter, there are transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

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[8] The Thayer-SWPA contract stated in part:

> "• • • It is understood and agreed that the rates set forth in the said Rate Schedule 'F-1' may, with the confirmation and approval of the Federal Power Commission be increased, decreased, or superseded, at any time, and from time to time, and that if so increased, decreased or superseded, the new rates shall thereupon become effective and applicable to the sale of Firm Power and associated energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval."

The parties have stipulated that the relevant portion of the Piggott-SWPA contract pertaining to rate changes is identical to that in the Thayer-SWPA contract.

Specifically, the Government contends (1) that section 7151(b) places the rate-making authority of the former FPC (including an assumed power to effect interim rates) in the Secretary of Energy; (2) that the decision to raise the rates paid by the Cities on an interim basis was a proper exercise of that authority; and (3) that such exercise was a "confirmation and approval" within the meaning of these contracts.

The Government's first contention fails upon a close examination of section 7151(b). Of critical importance is the introductory clause to the subsection, which states, "[e]xcept as provided in subchapter IV of this chapter." Subchapter IV (42 U.S.C. §§ 7171-7177) creates the FERC as an independent regulatory commission within the Department of Energy. Significantly, many of the rate approval functions of the FPC were transferred to the FERC in subchapter IV, such administrative review to be exercised *independently* of the Secretary of Energy. The first sentence of 42 U.S.C. § 7151(b), therefore, does not clearly provide a statutory basis for the Secretary of Energy's claimed authority to adopt an interim rate increase for SWPA customers.

The Government's argument, however, does not fail solely upon an examination of the first sentence in section 7151(b). The second sentence of the subsection provides, "The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence." In essence, the Government contends that section 7172(a)(2) powers encompass interim rate orders under the Flood Control Act. A review of 42 U.S.C. § 7172(a)(2) does reveal references to FERC rate-approval powers under the Federal Power Act and the Natural Gas Act, but *no* reference to similar powers under the Flood Control Act.[9] Thus, section 7151(b) of the

[9] 42 U.S.C. § 7172(a)(2) (Supp. III 1979) provides:

"(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be

DEOA, considered as a whole, does not on its face authorize the Secretary of Energy to effect interim rate increases under the Flood Control Act.[10]

Moreover, the Government's argument that the Secretary of Energy was empowered by the DEOA to implement interim rates under the Flood Control Act ignores an explicit provision of the DEOA, which provides in pertinent part:[11]

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

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necessary to the exercise of any function within the jurisdiction of the Commission:

> "(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and
>
> "(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act."

[10] The Government has cited case authority in support of the general proposition that the FPC was authorized to issue interim rate orders. *See, e.g., F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 83 S.Ct. 211, 214, 9 L.Ed.2d 199 (1962), *citing Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942), and *New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923). Reasoning from these cases, the Government concludes that the Secretary of Energy enjoys a similar authority under the Flood Control Act, to the extent that the Secretary of Energy has assumed the duties of the FPC under the Flood Control Act. Even assuming *arguendo* the latter point, we are unable to agree with the Government's sweeping conclusion regarding interim authority under the Flood Control Act. The cases cited by the Government regard the FPC's authority to issue interim rate orders under the Natural Gas Act, not the Flood Control Act. We also note that in the principal case cited by the Government, *Tennessee Gas*, the Supreme Court was called upon to consider the authority of the FPC to order an interim rate *reduction*, issued by the FPC pursuant to its duty under the Natural Gas Act to protect consumers from excessive rate charges. Thus, although *Tennessee Gas* upholds FPC authority to issue interim rate orders under the Natural Gas Act, it makes no reference to FPC authority under the Flood Control Act and therefore cannot be viewed as controlling in the case before us.

[11] 42 U.S.C. § 7191(a)(1) (Supp. III 1979).

Under section 5 of the Flood Control Act, confirmation and approval of the FPC was required *prior* to the implementation of any rate increase for SWPA customers. This FPC confirmation and approval function constitutes an additional "administrative procedure requirement" which, by the literal terms of section 7191(a)(1), continues to apply to administrative actions under the Flood Control Act. In short, the Secretary of Energy is bound by the administrative procedures set forth in the Flood Control Act, as was his predecessor, the Secretary of the Interior.

The Government's elaborate argument that the Secretary of Energy was provided with authority to enact interim rate increases under the DECA also fails to address plaintiffs' central theory of recovery is this case, breach of contract. As the Government concedes, we must enforce a mutually agreed-upon contract according to its terms.[13] The contracts in question state that rates may be increased "with the confirmation and approval of the Federal Power Commission * * * in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." While this court is not empowered to review the substantive grounds for the rate increase, where rate-making procedures give rise to a breach of contract claim, we must consider whether those procedures were exercised in compliance with the contracts.

In the present case the terms of the contracts clearly contemplate an increase in rate charges only after "confirmation and approval" by the FPC. No provision for interim increases even exists in the contracts. It is well established in this court that, where the language of a contract is unambiguous, contractual terms will be given their usual and ordinary

[13] *See California* v. *United States*, 213 Ct.Cl. 329, 341, 551 F.2d 843, 850, *cert. denied*. 434 U.S. 857, 98 S.Ct. 180, 54 L.Ed.2d 130 (1977); *Eldorado Canyon Resort, Inc.* v. *United States*, 209 Ct.Cl. 759, 760-61, 538 F.2d 347 (1976) (order); *Broome Constr., Inc.* v. *United States*, 203 Ct.Cl. 521, 530, 492 F.2d 829, 834 (1974).

meaning.[13] We consider FPC/FERC review to be an important administrative procedure which cannot be cavalierly ignored by the Department of Energy. Moreover, section 5 of the Flood Control Act provided that rate schedules were "to become effective upon confirmation and approval by the Federal Power Commission." The rule that contract terms will be given their ordinary meaning is particularly appropriate where the contract language is easily construed in harmony with the governing statute or regulation.[14] Here, the very language of the statute itself is incorporated into the contract terms. Finally, we are guided by Supreme Court precedent prohibiting unilateral rate increases proposed by utilities in derogation of express contractual terms, otherwise known as the *Mobile-Sierra* doctrine.[15] As applied to this case, the *Mobile-Sierra* doctrine dictates that the express contracts between plaintiffs and the SWPA, which contracts provide procedural safeguards prior to initiation of a rate increase, cannot be unilaterally modified by administrative fiat.

In addition to considering the governing statutes and literal language of the contracts, we are also persuaded by past agency practice in interpreting provisions of the contracts pertaining to rate increases. Plaintiffs contend that since the passage of the Flood Control Act in 1944, and up to passage of the DEOA in 1977, the Secretary of the Interior always sought FPC confirmation and approval of rate increases prior to making them effective. In support of this position, plaintiffs cite to

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[13] *American Science & Eng'g, Inc.* v. *United States*, 228 Ct.Cl. __, __, 663 F.2d 82, 88 (1981); *S. W. Aircraft Inc.* v. *United States*, 213 Ct.Cl. 206, 212, 551 F.2d 1208, 1212 (1977); *Hotpoint Co.* v. *United States*, 127 Ct.Cl. 402, 406, 117 F.Supp. 572, 574, *cert. denied*, 348 U.S. 820, 75 S.Ct. 32, 99 L.Ed. 647 (1954).

[14] *See, e.g., American Science & Eng'g, Inc.* v. *United States*, 228 Ct.Cl. at __, 663 F.2d at 88; *Timber Access Indus. Co.* v. *United States*, 213 Ct.Cl. 648, 658, 553 F.2d 1250, 1256 (1977); *Victory Constr. Co.* v. *United States*, 206 Ct.Cl. 274, 287, 510 F.2d 1379, 1386 (1975).

[15] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956) (*Mobile*); *F.P.C.* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956) (*Sierra*).

the 1957 order of the FPC confirming and approving the "F-1" rate schedule[16] on a final basis. The Government, in turn, responds by pointing out that the F-1 rate schedule was the *only* rate schedule applicable to plaintiffs' contracts during the 1957-79 period; that every other instance referred to by plaintiffs involved nothing more than an extension of existing rates, and that a single example of FPC confirmation and approval of rate *increases* on a final basis does not preclude the FPC's authority to confirm and approve rate increases on an interim basis. Additionally, the Government asserts that the FPC did, in fact, approve interim rate increases under the Flood Control Act in 1947,[17] and has approved interim rate increases three times since 1947.

An examination of the Government's contention regarding the 1947 rate increase, however, reveals that the "interim" rate increase approved by the FPC in 1947 was in fact final approval by the FPC of the first, yet independent, part of a two-part rate increase sought by the SWPA. Thus, in 1947, rates were not first placed into effect on an interim basis subject to a later confirmation, as was the case in 1979.[18] The second[19] and third[20] instances cited by the Government since 1947 were not approvals of interim rate increases sought by the SWPA under the Flood Control Act, but rather were interim rate increases sought by the Bonneville Power Administration under a separate statute, the Bonneville Project Act.[21]

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[16] Rate schedule F-1 was established in 1957 and made applicable to all firm power customers of the SWPA's system. As of May 1981, the SWPA was selling power to 55 customers (including plaintiffs) in a 6-state region consisting of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas.

[17] F.P.C. Docket No. IT-5971 (Feb. 13, 1947).

[18] This court was advised by the parties at oral argument that the FERC has only recently approved the interim rate increase affecting the SWPA customers at issue in this case.

[19] F.P.C. Docket No. E-8978, 54 F.P.C. 808 (1975).

[20] F.P.C. Docket No. E-9563, 42 Fed. Reg. 31,492 (1977).

[21] 16 U.S.C. §§ 832-832l, 838-838k (1976 & Supp. III 1979).

Finally, we turn to the fourth instance cited by the Government in which the FPC allegedly approved a rate increase pursuant to the Flood Control Act on an interim basis. A review of the record confirms the Government's contention that in 1975 the FPC, pursuant to the Flood Control Act, did approve rate schedules of the Southeastern Power Administration (SEPA) on an interim basis.[22] However, the record also reflects that the Department of the Interior strongly opposed this action by the FPC, as indicated in a letter of July 11, 1975, from the Assistant Secretary to the Chairman of the FPC which stated in part:

> We respectfully suggest that significant aspects of the Commission's action were without statutory authority and arbitrary. Under the Flood Control Act, the Commission's authority is limited to either confirming and approving the rates established by the Secretary or disapproving them; it does not have the authority to fix substitute rates, as it does for regulated utilities under the Federal Power Act. It follows from this that the Commission does not have authority to make its confirmation and approval conditional upon the outcome of further proceedings or upon the agreement by SEPA to make refunds or credits if the Commission changes its mind. * * *

In addition to this strong opposition to the very exercise of power at issue here, voiced by the Department of the Interior itself, the 1975 interim rate increase can be further distinguished from the rate increase now at issue. First, the 1975 FPC action was in regards to a rate increase sought by the *Southeastern* Power Authority, not by the SWPA, which serves a separate group of customers and may involve contracts with different terms. The 1975 action was also apparently effected in the absence of *contractual* terms requiring FPC approval on a final basis, in stark contrast to the 1979 interim increase involved here.

In summary, our review of the history of administrative practice under the Flood Control Act, considered as a whole,

[22] F.P.C. Docket No. E-7002, 54 F.P.C. 3 (1975).

does not support the Government's view of FPC rate confirmation and approval. Significantly, we are unable to discover a single instance in the period 1944-77 in which the FPC, pursuant to the Flood Control Act, approved on an *interim* basis a rate increase sought by the SWPA. Moreover, it was clearly the practice of the Secretary of the Interior, consistent with contractual requirements, to seek final confirmation and approval of rates by the FPC before making them effective. Accordingly, we find the actions of the Assistant Secretary of Energy in authorizing an interim rate increase prior to final approval of the FERC not supported by previous administrative practice in applying section 5 of the Flood Control Act. Although the interpretation given a statute by the agency charged with its administration is entitled to considerable deference,[23] where authority in the original statute (Flood Control Act) is claimed as the basis for a departure from past administrative practice, the agency's interpretation is subject to rigorous judicial review.[24]

In closing, we note that our resolution of the breach of contract claim now before us is further assisted by persuasive precedent established in a federal district court opinion disposing of very similar issues. In *United States* v. *Tex-La Electric Cooperative, Inc.*,[25] the Government brought suit against Tex-La, a SWPA customer, for failing to pay the interim rates prior to final confirmation and approval by the FERC. The two contracts at issue in *Tex-La* both required that any rate increase be " 'in accordance with and on the effective date

[23] *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Selman* v. *United States*, 204 Ct.Cl. 675, 681, 498 F.2d 1354, 1357 (1974).

[24] *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289, 94 S.Ct. 1757, 1769, 40 L.Ed.2d 134 (1974); *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-14, 69 S.Ct. 1251, 1260, 93 L.Ed. 1499 (1949). Although the substantive rate increase is not before us, when the increase impinges on contractual rights, we are empowered to review past administrative practice in evaluating the breach of contract claim.

[25] *United States* v. *Tex-La Elec. Coop., Inc.*, 524 F.Supp. 409 (E.D.La.), *appeal docketed*, No. 81-3715 (5th Cir. Nov. 20, 1981).

specified in the final order of the FPC containing such confirmation and approval.' "[26] In granting Tex-La summary judgment, the court concluded that "[t]he Section 5 [Flood Control Act] confirmation and approval function, incorporated into the contracts at hand, cannot be unilaterally abrogated."[27] We adopt a similar rationale in concluding that the Government breached its contract with plaintiffs in the case at bar.[28]

In summary, we hold that the rate increase ordered by the Assistant Secretary of Energy on an interim basis violated that provision of the contracts between plaintiffs and the Government which required "confirmation and approval" by the Federal Power Commission. All other arguments raised by the Government, although not directly addressed in this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the submissions of the parties, and after hearing oral argument, defendant's cross-motion for summary judgment is denied, and plaintiffs' motion for summary judgment is granted. We award plaintiffs judgment on the issue of liability and remand the cause to the trial division to determine the amount of recovery under Rule 131(c).

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[26] *Id.* at 414.

[27] *Id.* at 421.

[28] A second court has recently adopted the "careful analysis" employed by the *Tex-La* court. *See United States* v. *Northeast Texas Elec. Coop.*, No. H-81-604 (S.D.Tex. Dec. 9, 1981), *appeal docketed*, No. 82-2014 (5th Cir. Jan. 13, 1982). *See also Arkansas Power & Light Co.* v. *Schlesinger*, No. 79-1263 (D.D.C. Oct. 20, 1980), *appeal dismissed*, No. 80-2573 (D.C.Cir. Jan. 26, 1981). The Government has cited three federal district court cases as precedent for the view that the Secretary of Energy is authorized to implement interim rate increases pursuant to section 5 of the Flood Control Act, and that such interim increases do not constitute a breach of contract. *See Pacific Power & Light Co.* v. *Duncan*, 499 F.Supp. 672 (D.Or.1980); *Colorado River Energy Distrib. Ass'n* v. *Lewis*, 516 F.Supp. 926 (D.D.C.1981); and *Montana Power Co.* v. *Edwards*, No. 80-842PA (D.Or. May 10, 1981). In *Pacific Power* and *Montana Power*, decided by the same judge, there is virtually no discussion of the breach of contract issue which forms the basis of plaintiffs' complaint in the case before us, and thus the cases lack significant precedential value. *Colorado River* did not involve the Flood Control Act, was not a breach of contract case, and is therefore similarly inapposite.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
[693 F.2D 392]

UNITED STATES of America,
Plaintiff-Appellant,
v.
TEX-LA ELECTRIC COOPERATIVE,
INC., Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellant,
v.
NORTHEAST TEXAS ELECTRIC
COOPERATIVE, INC., Defendant-Appellee.

Nos. 81-3715, 82-2014.

Nov. 26, 1982.

Rehearing Denied Dec. 23, 1982.

RANDALL, Circuit Judge:

These consolidated cases come to us on appeal from the Eastern District of Louisiana and the Southern District of Texas. The single appellee,[1] Tex-La Electric Cooperative

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[1] There are actually two appellees in two consolidated cases, *United States* v. *Tex-La Electric Cooperative, Inc.* (No. 81-3715) and *United States* v. *Northeast Texas Electric Cooperative, Inc.* (No. 82-2014); however, since both cases present precisely the same legal issues, involve the same disputed funds, and concern exactly the same real parties in interest, we shall treat them throughout this opinion as one case involving "Tex-La" and "the government."

Inc., has thus far successfully challenged the validity of the government's new system for setting and raising the rates set out in the schedules according to which federally owned hydroelectric power is sold.

The novel situation that this case presents is this: in 1979, for the first time ever, new and higher federal electricity rates calculated pursuant to the Flood Control Act of 1944 were put into effect on an interim basis without an independent review by an independent agency. Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976 & Supp. IV 1980), imposes a requirement that rates first be *prepared* by the Secretary of the Interior and then *approved and confirmed* by the independent Federal Power Commission before becoming effective. It is the practical effect of this bifurcated scheme that forms the basis for this suit. The principal question before us is whether today, when the Federal Power Commission no longer exists (and when its functions have been largely taken over by the Federal Energy Regulatory Commission), "approved and confirmed" can be interpreted to vest interim rate implementing authority in the hands of the Secretary of the Interior's successor, the Secretary of Energy.

Although we reject many of the government's arguments and accept all of Tex-La's except one,[1] we hold for the reasons given below that the Secretary does have interim ratemaking authority under section 5 of the Flood Control Act of 1944. The decisions of the two district courts are therefore reversed.

I. HOW THIS CASE HAS ARISEN.

The key to the instant case lies in its history. What follows is not simply "background." Without the complex mix of partly conflicting statutes, rules, and unwritten practices that have come into being since the middle 1930s, this case simply would not have arisen.

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[1] We reject the contention of both parties that the 1977 Department of Energy Organization Act, 42 U.S.C. §§ 7101 to 7352 (Supp. IV 1980), does not materially change section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976 & Supp. IV 1980). We set forth our reasoning in Part II, *infra*.

A. Developments in the Law.

At least since the New Deal Congress has from time to time provided for the construction of various dams to control flooding, encourage commerce and navigation, and provide water for farming and other purposes. The hydroelectric potential of these early projects, so important today, was then often purely secondary and, in the case of the Flood Control Act of 1944 that governs the present case, was nearly forgotten entirely. *See* S.Rep.No. 1030, 78th Cong., 2d Sess. 3 (1944) (adding section 5 of the Act to the House bill, which had overlooked the fact that the proposed dams would produce electricity that would have to be sold). Many of these dams were built and run by the Army Corps of Engineers. The Corps was directed to turn over any surplus hydroelectric power to the Secretary of the Interior. The Secretary, in turn, had the responsibility for preparing appropriate rate schedules for the sale of the power. He was required to fix the schedules at the lowest level possible sufficient to pay for the cost of producing and transmitting the power while also amortizing that part of the dam construction costs that could be fairly attributable to the production of power. Flood Control Act of 1944, § 5, 16 U.S.C. § 825s. The hydroelectric facilities, in other words, were statutorily designed to be entirely self-supporting.

In order to sell the hydroelectric power turned over to him by the Corps of Engineers, the Secretary of the Interior created what eventually became five regional Power Marketing Administrations.[3] The immediate defendant in this suit, the Southwestern Power Administration (SWPA),

[3] The five PMAs, as they are called, are the Alaska Power Administration, the Bonneville Power Administration (the biggest and most important), the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration. The Western PMA is actually a product of the 1977 DOE Act, *supra* note 2, and was created by the Secretary of Energy to administer certain hydroelectric projects that had previously been run by the Bureau of Reclamation.

was created in 1943, *see* 8 Fed. Reg. 12,142 (1943), and was given the authority to manage all of the Corps of Engineers hydroelectric facilities in Arkansas, Kansas, Louisana, Missouri, Oklahoma, and Texas, *see* 10 Fed. Reg. 14,527—28 (1945). The administrator of SWPA was delegated the responsibility, among other things, of preparing rate schedules and of doing the necessary accounting and cost allocation studies.

After the rate sehedules were drawn up, but before they could become effective, they were submitted to the independent Federal Power Commission for review. The Flood Control Act specifically provides that the schedules were "to become effective upon confirmation and approval by the Federal Power Commission." Flood Control Act § 5. (This is the statutory provision that lies at the heart of this suit.) The Commission would generally hold public hearings, and then render a formal opinion either approving the rates and putting them into effect, or remanding the case to the appropriate Power Marketing Administration for further consideration.[4]

Under this system, all remained relatively peaceful until the mid-1970s. Then two things happened. First, the days of cheap energy ended and those of rapid inflation began, thus making it necessary for the Power Marketing Administrations to raise rates higher and more often than had ever before been necessary. *Compare United States Department of the Interior, Bonneville Power Administration, Docket Nos. E-6611, E-6905 & E-7242*, 34 F.P.C. 1462, 1464 (1965) (big administrative to-do over *three* percent rate increase), *with Secretary of Energy, Bonneville Power Administration, Docket No. EF-80-2011*, 45 Fed. Reg. 79,545, 79,546 (1980) (big administrative to-do over *eighty-eight* percent increase). And second, in 1977 Congress enacted the Department of Energy Organization Act, Pub. L. No. 95-91,91 Stat. 565 (codified at 42 U.S.C. §§ 7101 to 7352 (Supp. IV 1980)). The

[4] The procedures followed by the Federal Power Commission and the reasons justifying them present an extremely complex issue that we address in Part III.A, *infra*.

enactment of the DOE Act has given the parties here something to fight about; the rapid rise in the cost of everything over the past few years has made it worth their while.[5]

Because of the way it affects the above-quoted provisions of the Flood Control Act, the DOE Act has created the uncertainty that has produced the present suit. Congress passed the DOE Act because it found that "responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs." DOE Act § 101(4), 42 U.S.C. § 7111(4). The idea behind the Act was centralization and administration streamlining, but the result for those charged with interpreting the Flood Control Act has been confusion.

The DOE Act transfers the Flood Control Act functions of both the Secretary of the Interior and the Federal Power Commission. With respect to the Secretary of the Interior, the Act plainly provides:

> There are hereby transferred to, and vested in, the Secretary [of Energy] all functions of the Secretary of the Interior under section 5 of the Flood Control Act of 1944, and all other functions of the Secretary of the Interior, and officers and components of the Department of the Interior, with respect to . . . the Southwestern Power Administration.

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[5] Although the money immediately at stake in the present suit actually amounts to about $46 million, the government has informed us that its total amount at risk under section 5 of the Flood Control Act is about $800 million. It hardly needs emphasizing that if we were to affirm the district court, the power customers who have already paid the interim rates of the several PMAs (which is almost all customers) would create a veritable stampede in their rush to get their money back from the Court of Claims (now the Court of Appeals for the Federal Circuit). A further $400 million in collected interim rates is not at risk because the Bonneville Power Administration's interim collections have been sanctioned in a new act that applies only to the BPA. *See* Pacific Northwest Electric Power Planning and Conservation Act, § 7(i)(8), 16 U.S.C. § 839e(i)(8) (Supp. IV 1980).

DOE Act § 302(a)(1), 42 U.S.C. § 7152(a)(1). The Secretary of Energy thus unquestionably has the power to prepare rates through his newly acquired designee, the Administrator of SWPA.

The provisions for the functions of the old Federal Power Commission, now abolished in favor of the new (and also independent) Federal Regulatory Commission, are a little more complicated. At a first reading, Title IV of the DOE Act appears to transfer *all* of the hydroelectric power regulating functions of the Federal Power Commission to the new FERC. *See United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781, typescript op. at 7-8 (S.D. Tex. Aug. 19, 1982) (explaining how misleading a first reading can be). A closer reading, however, reveals that the only hydroelectric regulatory powers given to the FERC, *see* DOE Act § 402, 42 U.S.C. § 7172, are those included in the Federal Power Act of 1935. The Flood Control Act of 1944, the 1937 Bonneville Power Act, 16 U.S.C. § 832e (1976 & Supp. IV 1980), and the 1974 Federal Columbia River Transmission System Act, 16 U.S.C. § 838g (1976 & Supp. IV 1980), all of which regulate literally scores of federal hydroelectric projects, are not mentioned anywhere in the FERC provisions (title IV) of the DOE Act. We are therefore forced to turn to the "general transfers" section, which provides in pertinent part:

> Except as provided in title IV [the FERC provisions], there are hereby transferred to, and vested in, the Secretary [of Energy] the function of the Federal Power Commission, or of the members, officers, or components thereof.

DOE Act § 301(b), 402 U.S.C. § 7151(b). The legislative history of this section states in plain language that the section "transfers to the Secretary [of Energy] all functions of the Federal Power Commission, except those transferred to or vested in the Federal Energy Regulatory Commission in Section 402." H.R. Rep. No. 539, 95th Cong., 1st Sess. 65 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad.News 925, 936 (Con-

ference Report). *See* S. Rep. No. 164, 95th Cong. 1st Sess. 29 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad.News 854, 882-83 (same). The inevitable conclusion, and the one that nearly everyone has drawn, is that the Secretary of Energy also exercises the confirmation and approval function of the old Federal Power Commission. *See Sam Rayburn Dam, supra,* typescript op. at 8; *United States* v. *Tex-La Electric Cooperative, Inc.* 524 F.Supp. 409, 412 (E.D.La. 1981) (the opinion below); *Montana Power Co.* v. *Edwards,* 531 F.Supp. 8, 10 (D.Or. 1981) (Panner, J.); *Pacific Power & Light Co.* v. *Duncan,* 499 F.Supp. 672, 677—78 (D.Or.1980) (Panner, J.); Appellant's Opening Brief at 6; Brief for Appellee at 13. *But see City of Fulton* v. *United States,* 680 F.2d 115, 118 (Ct.Cl.1982) (misreading the statute for the reasons given in this paragraph, *supra,* and in *Sam Rayburn Dam, supra).* The net result is that after October 1, 1977, the effective date of the DOE Act, *see* Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (1977), *reprinted in* 42 U.S.C. § 7341 (Supp. IV 1980), the Secretary of Energy was charged both with developing federal hydroelectric power rates as the Secretary of the Interior used to do, and then with confirming and putting those rates into effect as the Federal Power Commission used to do. The Secretary in effect reviewed rates that he was ultimately responsible for developing in the first place.

This rather mysterious state of affairs lasted just over a year. Pursuant to his delegation of authority under section 642 of the DOE Act, 42 U.S.C. § 7252, the Secretary of Energy delegated away all of his federal hydroelectric rate regulation authority on December 22, 1978. He split his power into three components. First, the Assistant Secretary for Resource Applications,[8] acting through the Administrators of the five Power Marketing Administrations, was given the Secretary of

[8] In 1981 the Assistant Secretary of Resource Applications' interim rate approval and implementation responsibilities were transferred to the Assistant Secretary for Conservation and Renewable Energy. *See Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011,* 47 Fed. Reg. 4562, 4562 n. 1 (1982). To avoid drawing this unnecessary distinction, we refer to both of these officers as the "Assistant Secretary" throughout this opinion.

the Interior's old power to prepare new rate schedules. Second, the Assistant Secretary was also given the authority "to confirm, approve, and place in effect such rates on an interim basis" pending final approval and subject to refunds with interest. And third, the old Federal Power Commission's final confirmation and approval authority was given to the independent FERC. *See Department of Energy, Power Marketing Rates, Delegation Order for Confirmation and Approval*, 43 Fed. Reg. 60,636-37 (1978). What used to be a bifurcated procedure—rate development, then rate approval and implementation—has thus become trifurcated: the SWPA develops rates; the Assistant Secretary provisionally approves them and puts them into effect on an interim basis; and the FERC gives "final" approval, with any interim overcharges being returned with interest.

The Power Marketing Administrations, in any event, remain bound by their pre-DOE Act contracts, some of which greatly restrict the government's right to raise rates at all.[7] The two contracts in the present case which both appear to be typical federal hydroelectric contracts of their day, essentially track the language of section 5 of the Flood Control Act, with its bifurcated scheme for raising rates. Like any federal hydroelectric power case, the present dispute therefore has a contractual element as well.

B. The Facts of This Case.

This case arises out of the application of the Secretary's new trifurcated ratemaking procedures to two hydroelectric power contracts between the SWPA and Tex-La, the "864" contract and the "921" contract.[8]

[7] The SWPA's so-called "Aluminum Contract," for instance, has a provision in it forbidding the government from raising rates more often than once every five years. *See Southwestern Power Administration Rate Order SWPA—1*, 44 Fed. Reg. 13,068, 13,070 (1979).

[8] The two contracts, the material provisions of which are set out as an appendix to Tex-La's brief, are numbered 14-02-001-864 and 14-02-0001-921. Both are extensively quoted from in the opinion of the court below. 524 F.Supp. at 413 & nn. 4-5.

Both contracts are now just over twenty years old. The 864 contract was signed in 1958, and (for our purposes) immaterially amended in 1968. It provides for the sale of firm power and energy to Tex-La at rates developed by SWPA and implemented "with the confirmation and approval of the Federal Power Commission." The 921 contract provides for the sale of four specific kinds of power—the output of a particular dam, peaking power, excess energy, and interruptible capacity—and was signed in 1960, again with subsequent immaterial amendments. The 921 contract specifically calls for rate implementation "on the effective date specified in the *final order* of the Federal Power Commission containing . . . confirmation and approval" (emphasis added). Despite the slight differences in language between the two contracts, the parties have agreed that both are to be read alike, and that both essentially track the language of section 5 of the Flood Control Act.

The SWPA apparently began to experience its present financial difficulties sometime in the early 1970s. *See United States Department of the Interior, Southwestern Power Administration, Docket No. E-7172*, 42 Fed. Reg. 49,829-30 (FPC 1977) (account of six consecutive "temporary" approvals of existing rates under the 864 and 921 contracts beginning in 1971, and pending increases that somehow never materialized). By the late 1970s, SWPA's mounting deficits had become almost scandalous. The House and Senate appropriations committees demanded to know what was going on, and announced that they "intend[ed] to follow the progress of the Department [of Energy] actions closely so as to assure the necessary attention to this matter." H.R. Rep. No. 1247, 95th Cong., 2d Sess. 59 (1978). When, during the next year, the Administrator of SWPA admitted to a sub-committee of the House appropriations committee that SWPA had not had a rate increase in twenty-one years, *see Energy and Water Development Appropriations for 1980: Hearings Before [the Subcomm. on*

Energy and Water Dev., House] Comm. on Appropriations, 96th Cong., 1st Sess. 2996 (1979) (remarks of SWPA Administrator Hammett), responsive questioning from the Committee reflected some impatience, *id.* at 2996-98. Both because of the close congressional interest and because of the clear impossibility of supporting in the 1980s a supposedly self-sufficient program on rate schedules established in 1958 and 1960, SWPA was under considerable pressure to bring its rates up to date.

In 1978 and 1979 SWPA held, after appropriate notices in the Federal Register, *see, e.g.*, 43 Fed. Reg. 16,545 (1978) (first notice), two "public information forums" and two "public comment forums" so that the views of power customers and the interested public could be incorporated into new rate schedules. SWPA also held an informal meeting with Tex-La and its other customers to work out any remaining differences over how the new rates would be calculated. *See Appropriation Hearings, supra*, at 2997 (chronological summary of events). The new schedules were finally approved by the Assistant Secretary on March 1, 1979, effective April 1. *Southwestern Power Administration, Rate Order SWPA—1, 44 Fed. Reg. 13,068 (1979).* As provided for in the second part of the Secretary's trifurcated procedures, *see* 43 Fed. Reg. 60,636-37 (1978), this approval put the new rates into effect on an interim basis, pending final approval by the FERC. The Assistant Secretary commented: "The public participation process produced numerous and varied questions and comments. All of these have been considered; many have been accepted and incorporated in developing the revised rates." 44 Fed. Reg. at 13,069. The public participation resulted in a reduction of the originally proposed 42 percent rate increase to 33 percent. *Id.*

After a three-month-long public notice and comment period and a delay of over two years, the FERC finally rendered its decision on the interim rates. *Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011*, 46 Fed. Reg. 30,877 (FERC 1981). It disapproved of the rates and remanded them to SWPA for further consideration because they were *too low*. This time affirmatively supported by Tex-La and its other customers, SWPA gathered more data and petitioned the FERC to reconsider its decision and approve the rates as originally submitted. After another seven-month delay, the FERC finally approved the original 33 percent increase on January 25, 1982, retroactive to the effective date of the Assistant Secretary's 1979 interim approval order.[9] *See Secretary of Energy, Southwestern Power Administration, Docket No. EF79-4011*, 47 Fed. Reg. 4562 (FERC 1982). And that is the end of the administrative part of this story.

Meanwhile, several power customers had contended that the interim rates in effect from April 1, 1979 to (as it turns out) January 25, 1982, were illegal, and either refused to pay them, or did so under protest. *See City of Fulton* v. *United States*, 680 F.2d 115 (Ct.Cl.1982) (paying under protest); *United States* v. *Sam Rayburn Dam Electric Cooperative, Inc.*, No. H-80-1781 (S.D. Tex. Aug. 19, 1982) (refusal to pay parallel SWPA rate increase). The two present cases—which are actually just one case, involving the same money, contracts, and real parties in interest—arose when certain of the public electric cooperatives that make up the Tex-La umbrella cooperative refused to pay the increase. The government sued

[9] The parties have informed us that the retroactivity of this final FERC order has become the subject of a motion currently pending before the United States District Court for the Eastern District of Louisiana. *See United States* v. *Tex-La Electric Cooperative, Inc.*, Civil Action No. 80-2813, § K, Mag. 4 (E.D.La. filed May 10, 1982).

to collect the money owing on August 1, 1980, and March 27, 1981. The parties quickly agreed that there were no material issues of contested fact, and submitted their cases for summary judgment. The Eastern District of Louisiana ruled in favor of Tex-La on September 9, 1981, 524 F.Supp. 409 (E.D.La. 1981), and rendered final judgment accordingly on September 14. In the other case, the Southern District of Texas reached exactly the same result on December 9, 1981, "for the reasons stated in the careful analysis of the questions . . . [presented] to be found in the opinion of the United States District Court for the Eastern District of Louisiana." The government now appeals from the judgments rendered in both decisions.

II. THE EFFECT OF THE 1977 DOE ACT ON SECTION 5 OF THE FLOOD CONTROL ACT OF 1944.

Both parties, the court below, and every other court to consider the question have assumed that the DOE act has merely reorganized the functions of two of the principal federal hydroelectric power acts, thus leaving their substantive and procedural provisions entirely unaffected.[10] We respectfully disagree. The answers to the two specific questions presented on this appeal, namely, whether the Secretary's trifurcated procedures comply with section 5 of the Flood Control Act of 1944 and with the terms of the 864 and 921 hydroelectric power contracts, depend partly on the wording of the statutes and partly, on the intent of the Congresses that enacted them.

A. The Flood Control Act of 1944.

The text of the Flood Control Act and the intent of the Congress that enacted it in 1944 must necessarily be the starting

[10] The two major federal hydroelectric power statutes that contain the same bifurcated ratemaking procedures are the Flood Control Act of 1944 and its model, the 1937 Bonneville Project Act. 16 U.S.C. § 832e (1976 & Supp. IV 1980). The cases construing the acts are listed in the third-to-last paragraph of Part I.A, *supra*. *See also* Federal Columbia River Transmission System Act § 9, 16 U.S.C. § 838g (1976 & Supp. IV 1980) (same scheme).

points for any inquiry into the meaning that must now be given to the operative phrase, "the rate schedules to become effective upon confirmation and approval by the Federal Power Commission." Flood Control Act § 5, 16 U.S.C. § 825s. We think that Congress's intent leaves virtually no room for doubt. Because the original Flood Control bill did not provide for the sale of hydroelectric power, what is now section 5 was added by the Senate. And the Senate Report, like the House Conference Report that followed, did nothing more than indicate that what became section 5 was an adoption of the scheme set out in section 6 of the Bonneville Project Act of 1937. *See* S. Rep. No. 1030, 78th Cong., 2d Sess. 3 (1944) (adding section 5 and explaining why it was needed); H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944) (Conference Report). For guidance we must therefore look to section 6 of the Bonneville Project Act, which, exactly like the Flood Control Act, provides that rates "shall be prepared by the [appropriate Department of the Interior] administrator and become effective upon confirmation and approval thereof by the Federal Power Commission." Bonneville Project Act § 6, 16 U.S.C. § 832e (1976 & Supp. IV 1980).

Section 6 of the Bonneville Project Act was extensively discussed in various committees of both the seventy-fourth and seventy-fifth Congresses, and the question of who should have the power to set rates and why received especially close attention. The hydroelectric power provisions of the Act were drafted and recommended by a special Presidential commission chaired by Secretary of the Interior Harold L. Ickes called the National Power Policy Committee. Secretary Ickes's lucid and detailed explanation of the language that eventually found its way into both section 6 of the Bonneville Project Act and section 5 of the Flood Control Act is thus worth quoting in full:

> The Power Policy Committee suggested that the rate schedules should be prepared in the first instance by the [Secretary of the Interior's Local Power] Administrator, because the fixing of rates during the early years at least will depend largely upon an informed judgment of potentially available markets which can be made only by a study at close range. Such study may, it would seem, be more effectively carried on under the direction of the Administrator on the spot than under the direction of the [Federal] Power Commission. On the other hand, it would be desirable that the Administrator's allocation of costs between the various purposes of navigation, flood control, irrigation, and power which might be served by a multiple-purpose project like Bonneville ..., the estimates of operating costs, and the policies to be pursued to develop the widest possible markets, might appropriately be *checked and audited by a national agency in the light of national policy*. The primary responsibility for the development of rate schedules adaptable to regional circumstances should be the Administrator's, but certain advantages might be obtained by having the rate schedules, after they are prepared by the Administrator, approved by a national agency as being in conformity with national policy.

Columbia River (Bonneville Dam), Oreg. and Wash.: Hearings Before the [House] Comm. on Rivers and Harbors ... on H.R. 7642, 75th Cong., 1st Sess. 143-44 (1937) (prepared statement of Secretary of the Interior Harold L. Ickes) (emphasis added). There appears to have been no doubt in anyone's mind that a Federal Power Commission review in light of "national policy" in part meant "the protection ... of all the users of surplus electric energy generated at [Federal] projects" from excessive rates. S. Rep. No. 2280, 74th Cong., 2d Sess. 2 (1936) (Report on S. 4695, 74th Cong., 2d Sess. (1936), a predecessor of H.R. 7642); H.R. Rep. No. 2955, 74th

Cong., 2d Sess. 2 (1936) (report on H.R. 12873, also a 74th Cong., 2d Sess., predecessor of H.R. 7642); moreover, the statute itself reflects Secretary Ickes's expressed concern about the imposition of "undue cost[s] upon . . . consumers," *Hearings on H.R. 7642, supra*, at 143 (remarks of Secretary Ickes), by providing that rates "shall be fixed and established with a view to encouraging the widest possible diversified use of electric energy." Bonneville Project Act § 6. See also Flood Control Act § 5 (rates shall be established "in such manner as to encourage the most widespread use [of federal power] at the *lowest possible rates* to consumers consistent with sound business principles") (emphasis added). We think that this wealth of detail and specificity from Secretary Ickes's congressional testimony is more than simply "probative." As chairman of President Roosevelt's National Power Policy Committee, Secretary Ickes was responsible for drafting what became section 6:[11] as Secretary of the Interior he was also ultimately

[11] The peregrinations of what became section 6 require a footnote. The two bills recommended by the committees of the second session of the seventy-fourth Congress, S. 4695 and H.R. 12873, both placed *all* of the ratemaking function in the hands of the Federal Power Commission. This, however, was a departure from the language recommended by the eventual draftsmen, Secretary Ickes's National Power Policy Committee. At the same time, it was also the scheme preferred by the Federal Power Commission itself. See Letter from the Federal Power Commission to the House Rivers and Harbors Committee (May 3, 1937), *reprinted in Hearings on H.R. 7642, supra*, at 499-500. As a compromise, Secretary Ickes offered to give the Commission the power to revise rates, through the insertion of the following provision:

> If any rate schedule submitted by the Administrator is not approved by the Federal Power Commission, the Federal Power Commission may revise such schedule in conformity with the standards prescribed by this act, and as so revised such schedule shall become effective.

Hearings on H.R. 7642, supra, at 144 (remarks of Secretary Ickes, reading the proposed compromise amendment aloud to the Committee). When H.R. 7642 was reported out of the Committee, it duly included the above power-to-revise language. H.R. 7642, 75th Cong., 1st Sess. § 5 (1937, *Hearings on H.R. 7642, supra*, at 509, 512. *See* H.R. Rep. No. 1090, 75th Cong., 1st Sess. 3 (1937) (committee report recommending the bill). But then the power-to-revise language was deleted before this part of the bill, redesignated section 6, was finally considered by the full House. See H.R. Rep. No. 1507, 75th Cong., 1st Sess. 3, 5 (1937) (Conference Report) (setting out the full text of H.R 7642, as revised). The Act therefore implements the original recommendation of Secretary Ickes's National Power Policy Committee.

responsible for carrying its provisions into effect through his designee, the Bonneville Project Administrator (and eventually the Administrator of each PMA). We therefore conclude that Congress unmistakably intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by the local power administrators. *See also Hearings on H.R. 7642, supra,* at 150 (colloquy between Secretary Ickes and Representative Culkin explaining desirability of giving rate review function to an "expert" Commission).

B. The DOE Act.

The next, and more important question is what, if any changes the 1977 Congress intended to make in the bifurcated scheme of the 1937 and 1944 Acts. We turn first to what the DOE Act says, and then to what those who wrote and enacted it intended.

1. The "Plain" Meaning of the Act.

The "plain" meaning of the DOE Act presents a contradiction between two different theories, the "transferred but not changed" theory and the "deliberate amendment" theory. We think that even upon a bare reading of the statute the second of these is the more persuasive.

The case for the "transferred but not changed" theory at first seems appealing. The DOE Act actually *says* that its provisions were written in an effort to leave the then present law intact. Two sections are especially relevant. First, the "general transfers" section quoted above, DOE Act § 301(b), 42 U.S.C. § 7151(b), provides that the functions of the Federal Power Commission not expressly given to the FERC are "transferred to" the Secretary of Energy. And, as Tex-La has correctly pointed out, the word "transferred" necessarily precludes any notions of enlargement or expansion. Second, section 501 of the Act, entitled "Procedures," provides:

> If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this Act, provides administrative procedure requirements in addition to the requirements provided in this title, such additional requirements shall also apply to actions under that provision.

DOE Act § 501(a)(1), 42 U.S.C. § 7191(a)(1). Since section 5 of the Flood Contol Act on its face requires a bifurcated ratemaking procedure, it would seem that the quoted "procedural continuation" portion of section 501 would also require that this system remain unchanged.

We think, however, that upon closer examination the "transferred but not changed" theory collapses immediately and cannot be supported under any theory of statutory construction. We further believe that an understanding of what the 1977 Act actually did to the Flood Control Act leads unavoidably to the conclusion that the Secretary's present trifurcated ratemaking procedures are fully consistent with the demands of both statutes.

What the DOE Act actually did, as we have explained above, *see* Part I.A *supra*, was give the Secretary of Energy both the Secretary of the Interior's authority to develop rates and the Federal Power Commission's authority to confirm and approve them. Tex-La and the government both agree, as they must, that in the fifteen-month interval from October 1, 1977 (the effective date of the DOE Act), to January 1, 1979 (the effective date of the Secretary's delegation order), the Secretary of Energy arguably could have done almost anything to implement rates, so long as he complied with the "notice and comment" provisions of the Administrative Procedure Act.[18] The

[18] Because ratemaking is rulemaking, *see* APA § 5(c), 5 U.S.C. § 554(d) (1976), a full adjudicative hearing is not required. The provision in the APA that had exempted ratemaking for the sale of federally owned power from *all* provisions of the APA, APA § 4, 5 U.S.C § 553(a)(2), was expressly overridden in section 501(b)(3) of the DOE Act, 42 U.S.C. § 7191(b)(3). The question of who has to give what kind of "process" when is treated in more detail in Part III, *infra*.

DOE Act thus carries within itself an obvious contradiction: while expressly providing that the administrative features of the Flood Control Act should continue unimpaired, the DOE Act, by unifying all ratemaking authority in the person of the Seeretary of Energy, also makes it virtually impossible that this should be the case. If the 1977 Congress had truly wanted to preserve the pristinely independent Federal Power Commission review provided for in the Flood Control Act, it would not have unified rate authority in the Secretary. Without regulations[13] or a statute, a true separation of functions by definition cannot exist in one person.[14]

No one who accepts the basic outlines of the statutory and historical analysis presented in Part I.A of this opinion—Tex-La, the government, and the court in *Sam Rayburn Dam, supra*—has pretended not to see this obvious internal contradiction in the statute. The court's theory in *Sam Rayburn Dam* was that Congress simply made a mistake. *See Sam Rayburn Dam, supra,* typescript op. at 18 ("This Court readily concedes that it does not always understand the reasoning or logic behind all of the enactments by the Legislature, but it is the role of the judiciary to interpret and apply the laws and not to question the wisdom of those who made the laws."). Tex-La's theory is that although the statute may have inexplicably

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[13] The Secretary has promulgated such rules, now codified at 10 C.F.R. § 903 (1982); moreover, we think that he was under a statutory obligation to do so, see Part III, *infra*.

[14] Although FERC is part of the Department of Energy, it is independent. *See* DOE Act § 401, 42 U.S.C. § 7171. Similarly, the General Counsel's office of the NLRB is part of the Board, but it, too, is independent. *See* NLRA § 3(d), 29 U.S.C. § 153(d) (1976). The DOE Act, on the other hand, while retaining the Power Marketing Administrations as distinct organizational entities, places them under the complete control of the Secretary. *See* DOE Act § 302(a)(2), 42 U.S.C. § 7152(a)(2). There is no real independence at all, though in practice, of course, the Secretary could not possibly take the time to supervise closely the day-to-day affairs of each PMA. This "practical impossibility of close supervision" argument, however, could be made to apply to almost any complicated bureaucracy (whose subordinate members could hardly consider themselves "independent").

unified the two functions in the Secretary, the real mistake is his for having delegated away part of his power to the independent FERC (which he cannot control) instead of having invested it entirely in his own Assistant Secretary.

Having identified the internal contradictions in the DOE Act after a literal examination of its specific provisions, we are forced to turn to its general provisions, its overall purpose and design, in order to determine what the legislature must have intended. It is, as the Supreme Court has repeatedly pointed out, "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Philbrook* v. *Glodgett*, 421 U.S. 707, 714, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (quoting *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). *See* H. Hart & A. Sacks, *The Legal Process* 1415 (tent. ed. 1958) ("The whole context of a statute may be examined in aid of its interpretation, and should be whenever substantial doubt about its meaning exists in the interpreter's mind, or is suggested to him."); *see also* F. Lieber, *Legal and Political Hermeneutics* 20 (3d ed. St. Louis 1880) (1st ed. Boston 1839) ("However minutely we may define, somewhere we needs must trust at last to common sense and good faith."). Recourse to a statute's overall purpose and design is, moreover, especially justified when the purpose of the statute is unambiguous.

As expressed in virtually every provision of title I ("Declaration of Findings and Purposes"), the purpose of the DOE Act is to improve the efficiency of American energy production and unite the scattered governmental divisions with responsibility in the area under the leadership of a single new cabinet-level officer, the Secretary of Energy. *See* DOE Act §§ 101—102, 42 U.S.C. §§ 7111—7112. *See also* S. Rep. No. 164, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad. News 854, 858 ("Under the Department of Energy, responsibility for the formulation of energy policy will be

vested in a single official, the Secretary of Energy, who will be supported by a unified organization with the authority to direct Federal actions needed to implement that policy."); H.R. Rep. No. 539, 95th Cong., 1st Sess. 55 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 925, 925—26 (Conference Report)(same). In the eyes of Congress, divisions of authority—here, between the Secretary of the Interior and the Federal Power Commission—were a positive evil, something which the statute was designed to correct. Congress did not, in other words, unite the federal hydroelectric ratemaking authority of the Secretary of the Interior and the Federal Power Commission in the person of the Secretary of Energy by mistake. On the contrary, Congress seems to have done everything within its power to indicate that the unification was accomplished *on purpose*.

2. The Legislative History of the DOE Act.

The legislative history of the DOE Act reinforces this conclusion. Congress could not have been more explicit. Those who drafted the bill that became the DOE Act believed so strongly in the need for a highly centralized Energy Department with absolute control over the entire area that the original bill did not have any independent Federal Energy Regulatory Commission at all.

The first Secretary of Energy, Dr. James Schlesinger, was responsible for the final drafting and preparation of the bill for submission to Congress. *See* S. 826, 95th Cong., 1st Sess. (1977), *Department of Energy Organization Act: Hearings before the [Senate] Comm. on Governmental Affairs . . . on S. 826*, 95th Cong., 1st Sess. 4 (1977); H.R. 4263, 95th Cong., 1st Sess. (1977), *Department of Energy Organization Act: Hearings before a Subcomm. of the [House] Comm. on Government Operations . . . on H.R. 4263*, 95th Cong., 1st Sess. 2 (1977) (S. 826 and H.R. 4263 were the same bill). His original version created an independent "Board of Hearings and

Appeals" that, as everyone came to understand it, had virtually no jurisdiction: the only cases that the Secretary had to refer to the Board were those "required by law to be made on the record after opportunity for an agency hearing." S. 826 & H.R. 4263 § 401(a)(2). Since ratemaking is rulemaking and thus by definition not subject to adjudicative hearing requirements, Dr. Schlesinger and his colleagues were forced to concede that if the Board were ever given anything much to do it would not be through the interpretation of the language of any statute. *See, e.g., Hearings on H.R. 4263, supra,* at 674 (remarks of FEA General Counsel Fygi). Thus all interstate gas and electric power regulation, public and private, was left to the absolute discretion of the Secretary of Energy. Secretary Schlesinger's articulated defense of this unprecedented concentration of power in the hands of an executive officer was that "pricing is an integral part of [energy] policy," and that the whole purpose of the proposed DOE Act was, to centralize policymaking in one executive department *Hearings on S. 826, supra,* at 151 (remarks of Dr. Schlesinger).

In response to questions from the Senate committee, the Chairman of the Federal Power Commission confirmed that Dr. Schlesinger's contemplated centralization would effect a juncture of the two ratemaking functions set out in section 5 of the Flood Control Act and section 6 of the Bonneville Project Act:

> Now, in regard to the Bonneville and the Southwest[ern] and Southeast[ern] Power Administration[s], there is an example of where I believe greater coordination can be achieved. At the present time, [the] Department of the Interior proposes those rates, and the FPC confirms them.

Hearings on S. 826, supra, at 179 (remarks of FPC Chairman Dunham). Far from being overlooked or somehow forgotten, the two-stage ratemaking procedure at issue in the present case represented *specifically* the kind of inefficiency and fragmentation of authority that the DOE Act was designed to correct.

Introducing the bill in Congress, however, and actually getting it passed proved to be two entirely different matters. Led in part by Representative Moss of California, both the Senate and the House balked at vesting so much power in the hands of one officer of the executive department rather than in those of an at least nominally independent agency. In the Senate, Dr. Schlesinger's proposal never even made it out of committee. The version of S. 826 introduced on the Senate floor vested what amounted to all private energy pricing decisions in the hands of a newly strengthened independent Board. *See* S. 826, § 402, 123 Cong. Rec. 15,263 (1977). The Senators indicated that the new arrangement represented a political compromise worked out in committee. *See* 123 Cong. Rec. 15,278, 15,280, 15,281 (1977) (remarks of Sens. Jackson, Glenn & Javits). The House version of the bill, now redesignated H.R. 6804, emerged from committee relatively unscathed, *see* H.R. 6804, 123 Cong. Rec. 17,282 (1977), but quickly met a similar fate at the hands of Representative Moss during the floor debates. *See* 123 Cong. Rec. 17,302—10 (debate and adoption of the so-called Moss Amendment). When both Houses eventually agreed upon the Senate version, S. 826, Representative Moss expressed his satisfaction and remarked, "Under the language reported by the Conferees, the Federal Energy Regulatory Commission will exercise all but a very small portion of the functions now vested in the Federal Power Commission." 123 Cong. Rec. 26,119 (1977) *See* S. Rep. No. 367, 95th Cong., 1st Sess. 76 (1977) (second Conference Report) (listing some of the FPC powers not transferred to the FERC). The allocation of ratemaking power between the Secretary and the FERC thus represented a deliberate compromise, the result of the political balance of power during the first session of the ninety-fifth Congress.

The legislative history further indicates that the asserted discrepancy between the "transferred but not changed" theory as expressed in section 501(a)(1) and what the statute actually

accomplishes was inadvertent. Congress intended this clause to apply to the *substance* of the technical procedural requirements, and not to the identity of the agencies responsible for implementing them. *See* H.R. Rep. No. 539, 95th Cong., 2d Sess. 81 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 925, 952. For example, if the Flood Control Act had required hearings on the record, the Secretary would have been forbidden from abolishing those adjudicative procedures. *Id.* At the same time, the weakening of consumer protection through the elimination of bifurcation was considered to be a neeessary price to pay for improved administrative efficiency. The point is that Congress wished to avoid making any "substantive" changes in the law, and for their purposes "substantive" included hearing and other requirements that most lawyers in normal contexts would have termed procedural. *See id.;* 123 Cong. Rec. 17,264-65 (1977) (colloquy between Reps. Brooks & Eckhardt). Congress did recognize that the same theoretical protection could be worth a very great deal before an independent administrative agency like the Federal Power Commission and hardly anything before an officer of the executive department, *see Hearings on H.R. 4263, supra,* at 674 (questioning conducted by Rep. Moss), but the result was the Moss compromise—which does not include federal hydroelectric power ratemaking.

Though it is not drafted as happily as it might have been, the political ratemaking compromise reached by the ninety-fifth Congress is adequately expressed in the statute and rationally explained in the legislative history. We therefore think that we are required to enforce it.

Like Tex-La, the government, and the court in *Sam Rayburn Dam, supra,* we realize that the provisions of the DOE Act apparently do partially conflict with one another. But unlike Tex-La, the government, and the court in *Sam Rayburn Dam* we believe that the solution to the problem is not to act as though it did not exist, or to give effect to the

"transferred but not changed" theory at the expense of the general provisions, the legislative history, and even common sense; rather, we believe that we are required to give effect to the statute's obvious purpose and operative provisions, even if we must do so at the expense of literal compliance with the "transferred but not changed" theory.

Because of the apparent contradiction in the statute, it is impossible for *any* court to give effect to every provision. We must make a choice: Being forced to do so, we have no trouble in doing what makes the most sense and what best carries out the clearly expressed intention of the legislature. Despite the implicit expression of the "transferred but not changed" theory in sections 301(b) and 501(a)(1) of the Act we hold that the unification of the two Flood Control Act functions in the hands of the Secretary in effect amends section 5 of the Flood Control Act to alter the strict procedural requirement of a bifurcated rate implementation scheme.

This conclusion disposes of part of the case. The parties have conceded, as again they must,[18] that the 864 and 921 con-

[18] The constitutional prohibition against the enactment of ex post facto laws applies only to criminal statutes. *See, e.g., Haristiades* v. *Shaughnessy*, 342 U.S. 580, 594—95, 72 S.Ct. 512, 521-22, 96 L.Ed. 586 (1952). The obligations clause applies only to state enactments. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts.") Since a court must apply the law as it exists at the time of its decision, *see, e.g., Bradley* v. *School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), the only contractual or constitutional restriction that could apply to the DOE Act's effect on contracts written under the Flood Control Act would be the due process clause. *See, e.g., Sinking Fund Cases*, 99 U.S. 700, 718-19, 25 L.Ed. 496 (1879); *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir.1977) (effect of subsequently promulgated arbitration requirements on prior inconsistent contractual provision). *See generally* 1 J. McBride & T. Touhey, *Government Contracts* § 1.20[3] (1978 & Supp. 1982) (subsection entitled "Abrogation of Vested Rights"). This case does not involve the imposition of a rate increase where the contract forbade such increases; rather, the DOE Act merely instituted a slight procedural change in how the new rates were to go into effect. And as both parties concede, "interim" rates have always been

tracts should be read to reflect subsequent procedural statutory amendments. 524 F.Supp. at 419; 3 Record at 26, 32 (Case No. 81-3715). The two contracts track, and in effect incorporate by reference, the language of section 5 of the Flood Control Act. Since the procedural requirements of section 5 have been altered by the DOE Act, the two contracts should be read accordingly, i.e., as permitting the imposition of interim rates, subject to refund with interest, by the Secretary of Energy. As we shall now show, the only limitation on the Secretary's authority is that his procedures must carry out, insofar as possible, the directives of both applicable statutes.

III. TRIFURCATION AND THE SECRETARY'S REGULATIONS.

In an attempt to reconcile the conflicting elements of the DOE Act, the Secretary of Energy has codified his December, 1978, delegation order and promulgated regulations to preserve, as nearly as possible the two-stage review process described in section 5 of the Flood Control Act of 1944. We think that he has done all that he reasonably could do to carry out his statutory mandate, and that his trifurcated ratemaking procedures if anything err on the side of affording power customers too much procedural protection. And this, surely, is all that the two hydroelectric power contracts require.

The following analysis will focus on the administrative realities of federal hydroelectric ratemaking. Contemporaneous or near contemporaneous administrative practices often figure very importantly in the interpretation of an ambiguous statute. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55, 97 S.Ct. 2229, 2234, 53 L.Ed.2d

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lawfully imposed under the Flood Control Act as it was interpreted before the 1977 Act went into effect. *See* Part IV.A, *infra*. We do not address the question of whether Tex-La could have successfully challenged the rate of interest given, had it been necessary to return interim rate collections. *Cf.* 18 C.F.R. § 300.20(c)(3) (1982) (level of interest rates for BPA interim rate refunds under the Bonneville Power Act and the Pacific Northwest Electric Power Planning and Conservation Act).

100 (1977) (citing cases). In order to determine the purpose and practical effect of the bifurcated ratemaking mechanism, the key question then becomes *who* is required by *what* to give *how much* "process" *when*. In the years since the middle 1940s, when the PMAs and the Federal Power Commission first began working together, the answers to this question have changed dramatically.

A. Past Administrative Practice and Interpretation.

Until relatively recently, the several Power Marketing Administrations were not required to and did not afford their customers any kind of formal "process" at all. *See, e.g., United States Department of the Interior, Southeastern Power Administration, Docket No. E-7002*, 54 F.P.C. 3 (1975); *United States Department of the Interior, Bonneville Power Administration, Docket No. E-8978*, 52 F.P.C. 1912 (1974); *BPA, No. E-6611, supra*, 34 F.P.C. at 1462 (1965); *Southwestern Power Administration, Docket No. IT-5971*, 6 F.P.C. 407 (1947). Because there were no statutes, rules, or even unwritten practices or customs requiring hearings, power customers were entirely unprotected by any procedural safeguards in the initial stage of the ratemaking process. A customer was fortunate even to participate in informal, off-the-record discussions with the relevant PMA before a new rate schedule was submitted to the Commission for confirmation and approval. *See BPA, No. E-6611, supra*, 34 F.P.C. at 1464 (informal "conferences" held). There was not even the opportunity for the kind of "notice and comment" proceedings common in most ratemaking cases.

The second stage of the process—"confirmation and approval" from the Federal Power Commission—was therefore inordinately important. The Commission did give published notice and afford the opportunity for more formal oral hear-

ings.[18] The Commission's dedication to the principle of full and public administrative hearings under the Bonneville Project Act and the Flood Control Act was unambiguous. "This Commission," according to one per curiam opinion, "believes that it is appropriate and in the public interest to discharge its duties and responsibilities under the Bonneville Project Act and the Flood Control Act of 1944 *on the basis of evidentiary records which are developed during the course of public hearings.*" *United States Department of the Interior, Bonneville Power Administration, Docket No. E-8978*, 54 F.P.C. 808, 810 (1975) (emphasis added). The Commission's reviewing procedures under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act were lengthy, careful, and

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[18] To explain why it did so requires a short detour. Although most ratemaking is subject to the notice and comment provisions of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), the sale of public property, such as hydroelectric power, is specifically exempted. *See* APA § 4, 5 U.S.C. § 553(a)(2); *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 673 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Associated Electric Cooperative, Inc.* v. *Morton*, 507 F.2d 1167, 1177-78 (D.C.Cir. 1974), *cert. denied*, 423 U.S. 830, 96 S.Ct. 49, 40 L.Ed.2d 47 (1975). The exemption, however, was designed not to discourage agencies from "adopt[ing] voluntary public rule making procedures where useful to the agency or beneficial to the public," but rather to leave the question of whether to adopt formal procedures entirely up to the agency's good judgment. S. Rep. No. 752, 79th Cong, 1st Sess. 199 (1945) (legislative history of the APA). The Federal Power Commission accordingly adopted the practice, eventually codified in the Code of Federal Regulations, of holding not merely "notice and comment" proceedings, but full, adjudicatory hearings with cross-examination of witnesses. *See* 18 C.F.R. § 2.1(a)(1)(vi)(A) (1973) (superseded) (required publication of notice in the Federal Register, thereby invoking Commission's full "rules of practice"); *United States Department of the Interior, Bonneville Power Administration, Docket No. E-9563*, 58 F.P.C. 2498, 2500 (1977) (formal hearing ordered before ALJ, which, under 18 C.F.R. § 1.20(g)(1) (1977) (superseded), entails right of oral cross-examination of witnesses); *SEPA, No. E-7002, supra*, 54 F.P.C. at 3 (same, invoking 18 C.F.R. § 1.20 (superseded)); *BPA, No. E-8978, supra*, 52 F.P.C. at 1912-13 (same, invoking 18 C.F.R. § 1.20 (superseded)); *BPA, No. E-6611, supra*, 34 F.P.C. at 1465 ("presentations," presumably as that word is defined in 18 C.F.R. § 1.20(g)(1) (superseded), made before full Commission, and not just ALJ); *but cf. SWPA, No. IT-5971, supra*, 6 F.P.C. at 408 (full hearing not granted because rates approved were only "temporary," and were to go into effect on an "interim basis" only).

designed to afford power customers every imaginable procedural safeguard.

The Federal Power Commission's substantive review was equally careful and painstaking. Although the New Deal image of the apolitical, expert, and therefore deservedly autonomous agency has long since been questioned, *see, e.g.*, DeLong, *Models of Regulation*, 80 Mich. L. Rev. 885, 886-89 (1982) (summarizing the literature); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975) (leading analysis), the Federal Power Commission did its best to fulfill the ideal. Its reviewing function under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act did not in any way resemble the "hands off" kind of review often undertaken by courts of appeals. When urged to adopt this limited reviewing function, the Commission expressly rejected it and commented:

> Our jurisdiction ["within the framework of the Bonneville Act and the Flood Control Act"] . . . can neither be analogized to an independent rate investigation [under the Federal Power Act] *nor to the apppellate function of United States Courts of Appeals* over Commission decisions under the Federal Power Act. It evolves from a unique relationship between the Department of the Interior, a part of the Executive Branch, with managerial and ratemaking expertise over its projects, and, the Federal Power Commission, an independent agency of the Congess with special expertise in ratemaking. In establishing this relationship Congress did not limit us to the function of assuring that the Secretary had complied with the bare legal requirements of the statute[s]. It expected us to apply our independent expertise in evaluating the rates set by the Secretary.

BPA, No. E-6611, supra, 34 F.P.C. at 1465 (emphasis added). *See United States Department of the Interior, Southwestern Power Administration, Docket No. E-6943*, 56 F.P.C. 795, 802 (1976) (same); *BPA, No. 8978, supra*, 54 F.P.C. at 811

(same). Aided by full adjudicatory proceedings, and backed by a staff with special expertise in ratemaking, the Commission understood that it was required to undertake a substantive inquiry into the nuts and bolts of the federal hydroelectric power ratemaking process. The Commission's review under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act was therefore both procedurally and substantively exhaustive.

B. Present Administrative Practice and Interpretation.

The situation today is completely different. The "confirmation and approval" function, now exercised by the FERC, is considerably less than what it once was; conversely, the full panoply of procedural protections afforded complainants before the several PMAs in some ways rivals even what the old Federal Power Commission used to do.

The self-imposed limitations of the FERC on its reviewing authority under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act have been formally set out and explained in three recent opinions. In the first case to arise under either act after the passage of the DOE Act, the FERC said, "The Commission emphasizes that its role here is in the nature of an appellate body." *BPA, No. EF80-2011, supra,* 45 Fed. Reg. at 79,547. This is exactly the opposite of what the Federal Power Commission had said in the long passage just quoted. *BPA, No. E-6611, supra,* 34 F.P.C. at 1465. The justification for the about-face appears to be that, with the improvement in the procedures before the PMAs, extensive appellate proceedings are no longer cost-justified. *See United States Secretary of the Interior, Bonneville Power Administration, Docket No. E-9563,* 45 Fed. Reg. 80,882, 80,883 (FERC

1980).[17] *See also SWPA, No. EF79-4011, supra*, 46 Fed. Reg. at 30,878 (case at bar) (citing Nos. EF80-2011 & E-9563, *supra*, as controlling).

The recent procedural developments within the PMAs have indeed been dramatic.[18] Although SWPA has always "follow[ed] an informal practice on a case-by-case basis" according to no particular rules, 45 Fed. Reg. 86,976, 86,976 (1980) (description of prior procedural practices), formal rules were recently tested (as in the case at bar) and officially promulgated at the end of 1980. *See* 10 C.F.R. § 903 (1982). The rules require extensive public hearings, beginning with "public information forums," 10 C.F.R § 903.15, and culminating with non-adjudicative "public comment forums," 10 C.F.R. § 903.16. Although not adjudicative hearings in the sense of section 1.20 of the old Federal Power Commission's rules of practice, *see* 18 C.F.R. § 1.20 (1977) (superseded), the new public hearings nevertheless seem to provide all that could be desired in the way of procedural protection.[19]

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[17] This case, *BPA, No. E-9563*, was actually decided under section 9 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838g (1970 & Supp. IV 1980), which provides that rates "shall become effective upon confirmation and approval thereof by the Federal Power Commission." This section of the Act copies section 6 of the Bonneville Project Act and was intended to place in effect precisely the same scheme, governed by precisely the same legal standards. See H.R. Rep. No. 1375, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5810, 5814 (1974) (section 9 "preserves the existing requirement of law that rate schedules prepared by BPA must be approved by the Federal Power Commission before they become effective").

[18] This discussion does not include the Bonneville Power Administration, which had peculiar procedural rules imposed upon it by statute in 1980. *See* Part IV.B, *infra*.

[19] The parties essentially agree on this point, as it seems they must after *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (procedural dictates of the APA control). Note that the provision exempting federal hydroelectric power ratemaking from *all* of the procedural requirements of the APA has been expressly overridden. *See* note 12, *supra*.

The substantive quality of the new "interim rate" intermediate review by the Assistant Secretary also seems to be more than adequate. Although things may change with time, we have been given no reason to suspect at this juncture that his review is a mere sham or rubber stamp. He depends procedurally, of course, on the record made in the public proceedings before the relevant PMA, but his judgment as a higher ranking officer in the Department of Energy than the regional PMA administrator remains independent.[20] Still, the Assistant Secretary and the PMA administrator remain answerable to one person, the Secretary of Energy, and are hence at least in that sense not as independent from each other as was the Federal Power Commmission (answerable to Congress) from the Secretary of the Interior (answerable to the President). One could therefore reasonably claim that the current interim rate review has somehow lost the true independence present in the old system.

We think, however, that whatever lingering doubts that might exist about the substantive adequacy of the Assistant Secretary's review are resolved by the provision for a final administrative review before the FERC. In this case justice delayed is most definitely not justice denied. Rates are very carefully reviewed by the PMA itself after the various public proceedings and by the Assistant Secretary before rates go into effect at all. Then, if the FERC nevertheless determines that certain of the rates are unjustifiably high, the overcharges are returned with interest.[21] Given both the considerable confu-

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[20] Although counsel for the government has asserted that the reduction from a 42 percent to a 33 percent rate increase was made by the Assistant Secretary, our reading of the printed record indicates that it was SWPA itself that made the reduction, not the Assistant Secretary. *See Appropriation Hearings*, *supra* Part I.B, at 2997 (indirect statement to that effect); *SWPA, Order SWPA-1*, *supra*, 44 Fed. Reg. at 13,069 (same).

[21] The rate of interest is not specified, but the BPA, which now has separate and peculiar regulations of its own, gives its overcharged customers the same rate of interest that it itself must pay when it borrows. *See* 18 C.F.R. § 300.20(c)(3) (1982).

sion in the DOE Act about the continued existence of the bifurcated procedures of the Flood Control Act and the uncertainties of the modern American economy, the Secretary seems to have gone to considerable lengths to devise regulations that would keep rates current in as fair a way as possible.

This analysis leads us to conclude that the first two stages in the trifurcated procedures set out in section 903 of the Secretary of Energy's regulations—which must be fully complied with before rates go into effect even on an interim basis—fully meet the "process" concerns of those who originally designed and enacted the bifurcated ratemaking procedure set out in section 5 of the Flood Control Act. Correlatively, we do not think that the somewhat minimal benefits conferred by the FERC's new watered-down review procedures, especially when weighed against the substantial cost to the government of delay, are worth what in the present case was a twenty-seven month wait. (Any excessive charges are not absconded with, but are returned *with interest*.) We similarly believe that the present procedures more than meet the "excessive rate" concerns of those who, using the Flood Control Act's language as a model, drafted the 864 and the 921 contracts at issue in this case. Any other conclusion would require us to shut our eyes to the administrative realities—which we refuse to do. The Secretary's current interim rate implementing procedures are sound in policy and do as much as anyone could reasonably expect in reconciling the conflicting textual demands of the Flood Control and DOE Acts.

IV. CONGRESSIONAL RATIFICATION AND THE PROBLEM OF "INTERIM" RATES.

The parties have raised three subsidiary arguments that remain to be addressed. All of them concern the "interim" nature of the present rates. Although we think that the parties have made much ado about relatively little, the arguments nevertheless deserve a careful treatment, first, because their

consideration has, in part, led us to the result we reach today, and second, because they have been accepted by some courts.

A. The Four FPC Interim Rate Cases.

As both parties point out, the Federal Power Commission before it was abolished issued at least four "interim" rate orders under section 5 of the Flood Control Act and section 6 of the Bonneville Project Act. *United States Department of the Interior, Bonneville Power Administration, Docket No. E-9563*, 58 F.P.C. 2498 (1977); *SEPA, No. E-7002, supra*, 54 F.P.C. at 3; *BPA, No. E-8978, supra*, 52 F.P.C. at 1912; *SWPA, No. IT-5971, supra*, 6 F.P.C. at 407. Although these cases do show that the Federal Power Commission recognized the usefulness and legality of interim rates, they shed relatively little light on the present case.

Once the Secretary of the Interior develped rates and submitted them to the Commission for approval, the Commission had what amounted to plenary rate implementation authority. Since the Commission was under no legal obligation to hold any kind of hearings whatsoever, *see* note 16 *supra*, it clearly had the inherent administrative authority to implement interim rates virtually immediately. The Supreme Court has upheld this kind of ratemaking authority on a number of occasions. *See Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199 (1962) (holding that once there is plenary rate implementation authority, there must necessarily also be implied interim authority); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942) (same); *The New-England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923) (same, leading case). Neither the Bonneville Project Act nor the Flood Control Act imposed a requirement that implemented rates be somehow "final." Tex-La and the government have each conceded that dicta in two recent lower court decisions to the contrary is simply

mistaken, and we agree. *City of Fulton, supra*, 680 F.2d at 120-21; *Sam Rayburn Dam, supra*. The Federal Power Commission had final and plenary authority over rate implementation. A fortiori, under *Tennessee Gas* it could use only part of that authority and approve rates for an interim period. *See also* S. Rep. No. 272, 96th Cong., 1st Sess. 31 (1979) ("The Committee recognizes that prior to the Department of Energy Organization Act, the Federal Power Commission exercised interim rate approval authority with respect to the Administrator's rates.").

The issue in the present case is not whether interim rate authority exists but rather, given that it exists, who shall exercise it under the DOE Act. Tex-La's argument that interim rate authority must be exercised by the same administrative body as that which has the final authority is predicated upon the false assumption that the DOE Act did not modify the bifurcated procedure of the Flood Control Act.[22] We have ex-

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[22] Tex-La also argues that the Assistant Secretary's interim rate approval was somehow not "final" within the meaning of both the Flood Control Act and the two hydroelectric power contracts. Given the passage of the DOE Act, the "final" requirement of the Flood Control Act is in essence, a false issue and has been disposed of in Part II, *supra*.

The use of the word "final" in one of the power contracts is more problematical. Tex-La assumes without argument that the word should be interpreted according to its usual meaning in the judicial review of agency action cases, i.e., that "final" somehow embraces either the notion of administrative exhaustion or that of an unmodifiable order. Under this interpretation, rates could not be raised until such "final" administrative action has occurred—confirmation by the FERC. Again, we think that the 921 (as well as the 864) contract was written to do nothing more than track the language of section 5 of the Flood Control Act, which has been amended by the DOE Act.

We do not, in any event, think that the draftsmen had in mind anything like the "exhaustion" requirements that a court must consider in reviewing action taken by an administrative agency; we similarly do not think that they were concerned with the question of possible mootness that troubles a court when it reviews an administrative order that is still subject to modification. Even without the DOE Act's changes in the Flood Control Act, the various administrative review or "finality" cases that Tex-La cites would be inapposite. *See, e.g., McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) (finality in sense of administrative exhaustion); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 554, 82 S.Ct. 1459, 1474-75, 8 L.Ed.2d 671 (1962) (finality in sense of non-modifiability required in order to avoid possibility of rendering advisory opinion).

plained our reasons for rejecting this assumption in the first three Parts of this opinion.

B. Congressional Ratification of the Delegation Order.

In 1980 Congress in effect modified section 6 of the Bonneville Project Act by enacting the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 to 839h (Supp. IV 1980) ("Pacific Power Act"). In so doing, it considered and partly rejected the Secretary of Energy's trifurcated ratemaking procedures. The parties vigorously urge that these recent congressional deliberations should influence our decision today but—quite apart from the somewhat dubious propriety of relying upon this kind of post hoc "legislative history"—we have found the deliberations neither very helpful nor applicable to the present case. The deliberations do, however, highlight some of the policy problems involved in federal hydroelectric power interim ratemaking, and we have carefully considered them before reaching our decision today.

As enacted after considerable debate, section 7(i)(6) of the Pacific Power Act, 16 U.S.C. § 839e(i)(6), gives the Act's interim rate authority to the FERC, which was required to issue regulations for that purpose within one year. *See* 18 C.F.R. § 300 (1982). In order to fill the contemplated one-year gap before the FERC could promulgate its interim rate regulations, section 7(i)(6) also authorized the Secretary of Energy "to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to the effective date of this Act." Pacific Power Act § 7(i)(6), 16 U.S.C. § 839e(i)(6). The Secretary's one-year authority, and its ultimate vesting in the hands of the FERC, is significant for two reasons.

First, Congress clearly understood and approved of the Secretary's exercise of the interim ratemaking function under his December, 1978 delegation order. As the Chairman of the

House Energy and Commerce Committee explained to his colleagues on the House floor, the Act "authorizes the Secretary of Energy to approve . . . rates on an interim basis during [the] 1-year period in accordance with the applicable procedure followed by the Secretary at the present time for such interim approvals." 126 Cong. Rec. H10685 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell). *See also* 126 Cong. Rec. H9854 (daily ed. Sept 29, 1980) (remarks of one of the principal sponsors, Rep. Swift) ("[T]he Secretary of Energy may, as he does today, grant . . . interim approval . . . ."). It is therefore indisputable that the ninety-sixth Congress—which was only one Congress removed from the ninety-fifth that passed the DOE Act—fully recognized at least the bare legality of the Secretary's trifurcated ratemaking procedures.

The second important point, as Tex-La has correctly observed, is that even though the ninety-sixth Congress thought that the Secretary's December, 1978 trifurcation order was legal, it also thought that its interim ratemaking procedure was unwise. The original bill as recommended by the Senate, S. 885, 96th Cong., 1st Sess. § 7(a), S. Rep. No. 272, 96th Cong., 1st Sess. 9 (1979), and considered by the House, S. 885, 96th Cong., 2d Sess. § 7(i)(6), H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 1, at 19 (1980), vested interim ratemaking authority *entirely* in the FERC. The rationale seems to have been the same as that advanced over forty years earlier by Secretary Ickes's original National Power Policy Committee: rates should not go into effect until "after substantive review" by an independent agency. H.R. Rep No. 976, 96th Cong., 2d Sess., pt. 1, at 81 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5989, 6017 (minority committeemen expressing satisfaction with this aspect of the bill). The Secretary's vigorous defense of his already existing interim rate implementation procedures was to no avail, Letter from the Department of Energy to the House Subcommitee on Water and Power (March 11, 1980), *reprinted in* H.R. Rep.No. 976, 96th Cong., 2d Sess., pt. 2, at

60-63 (1980), *and in* 1980 U.S. Code Cong. & Ad. News 6058-61, and resulted only in the eventual ratification of his existing procedures for the temporary interval after the effective date of the Act and before promulgation of regulations by the FERC. *See* S. 885, 96th Cong., 2d Sess. § 7(i)(6), H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 2, at 20 (1980) (this is still a third version of the bill S. 885; the enacted language tracked yet a fourth version that imposed the one-year time limit for the FERC to promulgate its regulations).

The Pacific Power Act, in short, has created a deliberate difference between the Bonneville Power Administration's rate implementation procedures and those of the other four PMAs. (The BPA is also now required to permit some oral cross-examination during its public hearings.) In changing the status quo for the BPA, Congress appears to have shown no marked unhappiness with what is going on in the other four PMAs. If anything, we think that this supports the result that we have reached.

C. Implied Rate Implementation Authority.

The parties, finally, have vigorously argued about the effect of the DOE Act's boiler-plate "necessary and proper" clause, DOE Act § 644, 42 U.S.C. § 7254, and about the DOE Act's incorporation by reference of the Natural Gas Act's similar boiler-plate "necessary and proper" clause, DOE Act §§ 302(b), 402(a)(2), 42 U.S.C. §§ 7151(b), 7172(a)(2). *See* Natural Gas Act of 1938, § 16, 15 U.S.C. § 717*o* (1976 & Supp. IV 1980). *See also* Federal Power Act of 1935, § 309, 16 U.S.C. § 825h (1976 & Supp. IV 1980) (same kind of provision, also incorporated by reference into the DOE Act). The problem arises because the Supreme Court has definitively held that this kind of clause, and section 16 of the Natural Gas Act in particular, contains an implied authority to issue interim rate orders. *See, e.g., Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199 (1962).

We reject the above arguments for the Secretary's exercise of an interim rate authority essentially for the same reasons that the court below rejected them. The Natural Gas Act, like most modern ratemaking statutes, provides for a plenary ratemaking authority and vests in it one body, there, the Federal Power Commission. As the Supreme Court held in *Tennessee Gas*, an interim authority follows naturally from a plenary authority under the usual "necessary and proper" clause. What the government has failed to understand in urging upon us a similar argument in the present case is that such a holding necessarily depends upon the existence of a plenary authority. In this case the rate developer has none; the scheme set out in section 5 of the Flood Control Act of 1944 *divides* rate authority and vests it in two separate branches of the government. The government's suggested approach assumes the validity of the conclusion even before the process of deduction has begun. *But see Montana Power Co.* v. *Edwards*, 531 F.Supp. 8 (D.Or. 1981) (adopting the approach attacked in this paragraph); *Pacific Power & Light Co.* v. *Duncan*, 499 F.Supp. 672 (D.Or. 1980) (same); *but cf. Colorado River Energy Distributors Ass'n* v. *Lewis*, 516 F.Supp. 926 (D.D.C.1981) (correctly relying on *Tennessee Gas* in hydroelectric ratemaking case under section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (1976), which gives the Secretary plenary authority). To resolve this case, we are forced to examine the substantive provisions of the Flood Control and DOE Acts, which we have done in the first three Parts of this opinion.

V. CONCLUSION

The various provisions of the two acts do seem to conflict with one another. Those responsible for the design of the scheme embodied in section 5 of the Flood Control Act of 1944—Secretary of the Interior Harold Ickes's National Power Policy Committee of 1937—originally placed the rate development and rate approval functions in separate hands in order to guarantee that rates would be "appropriately . . . checked and audited by a national agency in the light of national policy." *Hearings on H.R. 7642, supra,* at 144. While in effect stating that these two functions were transferred but not changed, DOE Act §§ 302(b), 501(a)(1), the Department of Energy Organization Act also transferred both functions to the Secretary of Energy alone. Some change, we submit, is therefore unavoidable. The architects of the bifurcated scheme in section 5 of the Flood Control Act (and in section 6 of the Bonneville Project Act) presumably did not intend that rate development and the requisitely independent "check and audit" could both be done by one man, or even one department. Thus, the conflict between the provisions in the DOE Act is patent, and must be forthrightly addressed.

We think that the Secretary of Energy, through his delegation order of December, 1978, has resolved the conflict in the statute as best he reasonably could. He has delegated rate development to the local Power Marketing Administrations, rate approval and interim implementation to his own Assistant Secretary, and final approval to the independent agency, the FERC. This trifurcated arrangement does as much as possible to resolve the Flood Control Acts command that there be an *independent* check on ratemaking, and the DOE Act's command that ratemaking be made more efficient through the centralization of control in one officer, the Secretary of Energy.

The two hydroelectric power marketing contracts in this case each track the language of the Flood Control Act and

therefore also contemplate that its bifurcated procedures will be used when rates are raised. The DOE Act has slightly altered this statutory procedure, but since the parties have conceded that the contracts should be read to incorporate subsequent statutory alterations,[23] we hold that the Secretary of Energy is entitled to use the new trifurcated procedures in raising rates under the two contracts.

We wish to underscore finally, that a conclusion contrary to the one that we have reached today would be difficult to justify on almost any terms except the most literal. A contrary conclusion would mean that the DOE Act's unification of the rate development and rate confirmation functions in the Secretary of Energy would have produced, after the trifucation of the delegation order, a most unlikely result: the Secretary's current trifurcated scheme would have been struck down because it gave litigants *too much* "process" by giving them one last, truly independent review before the FERC. (No one disputes that before the delegation order the whole ratemaking authority could have been exercised by the Secretary or an Assistant Secretary alone.) Whatever the role of common sense in interpreting the oftentimes somewhat mystifying pronouncements of the legislature, we think that at the very least it requires searching study and careful consideration before we strike down a scheme that gives the complainants *too much* process. Such a result is, in any event, unnecessary here and we reject it absolutely.

REVERSED.

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[23] *See* note 15, *supra*, and accompanying text.

APPENDIX J

United States Court of Appeals
For the Fifth Circuit

Nos. 82-2564 &
83-2341

D. C. Docket No. H-80-1781

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
SAM RAYBURN DAM ELECTRIC
COOPERATIVE, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before CLARK, Chief Judge, GEE and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 27, 1983

ISSUED AS MANDATE: Sep 28 1983

APPENDIX K

IN THE UNITED STATES CLAIMS COURT

CITY OF FULTON, CITY OF LAMAR,
CITY OF THAYER, CITY OF PIGGOTT,
Plaintiffs,

v.

THE UNITED STATES,
Defendants.

No. 509-80C
[Filed Nov. 4, 1982]

DEFENDANT'S FURTHER RESPONSE TO ORDER OF SEPTEMBER 13, 1982

On September 13, 1982, the parties were ordered to submit:

(1) a report on the status of efforts to stipulate or otherwise agree upon a computation of damages; and

(2) a statement of the need for any further proceedings to determine the amount of plantiffs' recovery.

In defendant's previous response, dated September 30, 1982, it was indicated that the Solicitor General was in the process of deciding whether to seek certiorari. It has now been decided that the defendant will not seek certiorari at this time.

Defendant reserves its right to petition for a writ of certiorari upon entry of final judgment in this case. 28 U.S.C. § 1255; *United States* v. *Clark*, 445 U.S. 23, 25, fn. 2 (1980).

In addition, in light of the recent Federal Court Improvements Act of 1982, P.L. 97-164, 96 Stat. 25, the defendant also reserves any appeal rights it may have to the United States Court of Appeals for the Federal Circuit from entry of final judgment in this case.

Having conferred together, the parties request that the Court grant them a period of 60 days in which to seek a

stipulation on all damages in this case. If the parties agree that no such stipulation can be achieved, the parties will promptly notify the Court and request that further appropriate preceedings be instituted.

Respectfully submitted,
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Assistant Attorney General
Civil Division

JOHN W. SHOWALTER
Attorney, Civil Division
Department of Justice

OF COUNSEL:
LARRY ROWE
Attorney
Department of Energy

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Opposition

Supreme Court, U.S.
FILED
DEC 23 1983
ALEXANDER L. STEVAS

No. 83-676

In the Supreme Court of the United States

OCTOBER TERM, 1983

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-676

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Secretary of Energy lacks authority under Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, to issue interim hydroelectric power rates. Petitioner therefore asserts that the court of appeals erred in affirming the district court's judgment on the basis of its prior decision in *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982) (Pet. App. A78-A117).

1. This action was commenced by the United States in the United States District Court for the Southern District of Texas to collect certain increased rates for hydroelectric power sold to petitioner. The rates were established by the Southwestern Power Administration following notice and comment and were put into effect on an interim basis by the Department of Energy (DOE) pursuant to a Delegation

Order published December 21, 1978 (43 Fed. Reg. 60636-60637). Petitioner refused to pay the increase on the grounds that Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, forbids the institution of interim rates and that its contract with the government required it to pay only "final" rates.[1]

On August 13, 1982, the district court granted petitioner's motion for summary judgment (Pet. App. A10-A43). On November 26, 1982, however, the United States Court of Appeals for the Fifth Circuit decided, in a case substantially identical to this one in all relevant respects, that the Secretary of Energy "does have interim ratemaking authority under section 5 of the Flood Control Act of 1944." *United States* v. *Tex-La Electric Cooperative, Inc., supra* (Pet. App. A79). Accordingly, on April 25, 1983, the district court vacated its original order and issued a final judgment for the United States (*id.* at A5).

In the court of appeals, the United States moved for summary disposition on the basis of *Tex-La* (Pet. App. A4). In response, petitioner argued that *Tex-La* had been wrongly decided (*ibid.*). The court of appeals rejected petitioner's argument per curiam, granted the government's motion for summary disposition, and affirmed the district court's judgment for the United States (*id.* at A3-A4).

2. The decision of the court of appeals is correct[2] and does not conflict with any decision of this Court or any final order or decision of any other court of appeals. Further review by this Court is unwarranted.

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[1]The interim rates disputed by petitioner have since been given final approval by the Federal Energy Regulatory Commission (FERC), after original disapproval because they were too low (Pet. App. A88).

[2]The substantive arguments raised by petitioner have been exhaustively analyzed by the Fifth Circuit in its *Tex-La* decision. We refer the Court to that opinion for a detailed rebuttal of the position urged by petitioner (Pet. App. A78-A117).

a. Petitioner first argues that the court below erred in following *Tex-La* because that decision "did not examine the ultimate issue of pre-final rate implementation" (Pet. 11). To the contrary, however, the Fifth Circuit in *Tex-La* extensively considered whether the Secretary had the power to issue interim rates (see, *e.g.*, Pet. App. A83-A89, A94-A95, A101-A102, A111-A116) and specifically held that "the Secretary does have interim ratemaking authority under section 5 of the Flood Control Act of 1944" (Pet. App. A79). Accordingly, the court of appeals correctly concluded that *Tex-La* controlled the disposition of this case.

b. Petitioner's fundamental argument is that *Tex-La* was incorrectly decided (Pet. 18-21). Contrary to petitioner's submission, however, that decision is in full accord with controlling principles of statutory interpretation.[3]

As the Fifth Circuit noted in *Tex-La*, Section 5 of the Flood Control Act of 1944 "on its face requires a bifurcated ratemaking procedure" (Pet. App. A94) with ratemaking authority divided between the Secretary of the Interior (to develop rates) and the Federal Power Commission (to confirm and approve rates). 16 U.S.C. 825s. The Department of Energy Organization Act (DOE Act), 42 U.S.C. (Supp. V) 7101 *et seq.*, altered this procedure by abolishing the Federal Power Commission and transferring the Commission's authority over rate approval, as well as the Secretary of the Interior's authority to develop rates, to the Secretary of Energy. 42 U.S.C. 7151(b). The *Tex-La* court observed that Congress "did not * * * unite the federal hydroelectric

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[3]Petitioner's argument based on its contract with the federal government (Pet. 18) is inseparable from the statutory construction question resolved in *Tex-La*. As the Fifth Circuit noted in *Tex-La*, petitioner's contract tracks the language of the Flood Control Act of 1944 and "[s]ince the procedural requirements of section 5 have been altered by the DOE Act, the * * * contract[] should be read accordingly" (Pet. App. A102).

ratemaking authority of the Secretary of the Interior and the Federal Power Commission in the person of the Secretary of Energy by mistake" (Pet. App. A97). Accordingly, on the basis of a thorough examination of the legislative history (*id.* at A97-A101), the *Tex-La* court concluded that Congress had intended "to alter the strict procedural requirement of a bifurcated rate implementation scheme" (*id.* at A101). Because the Secretary of Energy could propose and then confirm hydroelectric rates under the DOE Act, the court concluded that he could take the less drastic step of delegating interim authority to approve rates to an Assistant Secretary, with final rate approval delegated to the Federal Energy Regulatory Commission (*id.* at A84-A85, A89-A102, A116-A117). The court of appeals therefore held that Section 5 of the Flood Control Act of 1944, as modified by the DOE Act, permits "the imposition of interim rates, subject to refund with interest, by the Secretary of Energy" (Pet. App. A102).[4]

It is well-established that, in construing a statute, the "objective * * * is to ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). That task becomes quite difficult where, as here, the statutory scheme contains internal contradictions, because "[i]f possible, all sections of the Act must be reconciled so as to produce a symmetrical whole." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) (footnote omitted). Statutory provisions in apparent conflict must be reconciled, if fairly possible, so as to give effect to each provision. See, *e.g.*, *Beals* v. *Hale*, 45 U.S. (4

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[4]The *Tex-La* court also commended the Secretary for doing "as much as possible to resolve the Flood Control Acts [*sic*] command that there be an *independent* check on ratemaking, [with] the DOE Act's command that ratemaking be made more efficient through the centralization of control in one officer, the Secretary of Energy" (Pet. App. A116) (emphasis in original).

How.) 36, 53 (1846). That task is "nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines." *Local 1976, United Brotherhood of Carpenters & Joiners* v. *NLRB*, 357 U.S. 93, 100 (1958).

The court of appeals in *Tex-La* adhered scrupulously to these canons of statutory construction. Having found internal contradictions in the Flood Control Act of 1944 and the DOE Act, it nevertheless preserved the symmetry of the statutory scheme by giving as much effect to each of the conflicting provisions as was fairly possible. The Fifth Circuit in *Tex-La* correctly concluded that the ratemaking procedure challenged by petitioner accords rate payers the essential protections of the bifurcated ratemaking proceeding contemplated by the Flood Control Act of 1944 by providing two levels (rather than one) of administrative rate approval and by assuring refunds, with interest, of any interim rates not finally approved by FERC. That procedure, moreover, does not undermine the basic policy of the DOE Act, which was designed to consolidate the hydroelectric ratemaking process within a single government agency.[5]

c. Petitioner asserts (Pet. 12) that review in this Court is appropriate because the decision below conflicts with the decision of the former Court of Claims in *City of Fulton* v.

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[5]As the *Tex-La* court noted (Pet. App. A94) (footnote omitted), under the DOE Act the Secretary of Energy "could have done almost anything to implement rates, so long as he complied with the 'notice and comment' provisions of the Administrative Procedure Act." Therefore, petitioner's argument that the Secretary lacks authority to provide an intermediate level of rate approval is indeed unusual. Because the Secretary could have designated as "final" the interim rate approval challenged here, petitioner is in essence arguing that the ratemaking scheme should be "struck down because it [gives] litigants *too much* 'process' " (Pet. App. A117) (emphasis in original). The government submits, and the *Tex-La* court found, that such a result is contrary to common sense and express statutory purpose (*ibid.*).

United States, 680 F.2d 115 (Ct. Cl. 1982) (Pet. App. A65-A77). Any possible conflict with that decision, however, does not presently warrant the attention of this Court.

City of Fulton, commenced while *Tex-La* and this action were pending in district court, is an action against the United States to recover alleged overpayments made on the basis of the interim hydroelectric power rates challenged by petitioner. Relying in part on the district court decisions that were subsequently reversed in *Tex-La*, the Court of Claims awarded plaintiffs judgment on the issue of liability and remanded the case for further proceedings (Pet. App. A77). That litigation is now before the trial court awaiting final judgment. Upon the issuance of that judgment, the United States will be in a position to seek further review in the United States Court of Appeals for the Federal Circuit. See Pet. App. A119. Because the Federal Circuit may well reconsider *City of Fulton* in light of the Fifth Circuit's persuasive decision in *Tex-La*, review by this Court of the issue of statutory construction raised by petitioner would be premature at this time.

There is a substantial possibility that the Federal Circuit will reverse its position in the *City of Fulton* litigation. That decision was based on the Court of Claims' conclusion that the DOE Act transferred the Federal Power Commission's ratemaking authority to FERC rather than to the Secretary of Energy. See Pet. App. A69-A71. As the Fifth Circuit explained in *Tex-La*, however, that conclusion rests upon a plain misreading of the DOE Act (Pet. App. A83-A84). The *Tex-La* court noted that, while a "first reading" of the DOE Act "appears to transfer *all* of the hydroelectric power regulating functions of the Federal Power Commission to the new FERC," a "close[] reading" of the statute "reveals that the only hydroelectric regulatory powers given to the FERC * * * are those included in the Federal Power Act of 1935" (Pet. App. A83) (emphasis in original). The Flood

Control Act of 1944, the Act at issue in this litigation, is "not mentioned anywhere in the FERC provisions * * * of the DOE Act" (Pet. App. A83). Because the plain language of the DOE Act, 42 U.S.C. 7151(b), transfers to the Secretary of Energy all functions of the Federal Power Commission not specifically conferred on FERC, the Fifth Circuit correctly found that "[t]he inevitable conclusion, and the one that nearly everyone has drawn, is that the Secretary of Energy * * * exercises the confirmation and approval function of the old Federal Power Commission" (Pet. App. A84) (citing cases).

In view of the fact that *City of Fulton* rests upon a patent misreading of the DOE Act, as the Fifth Circuit pointed out in *Tex-La,* the Federal Circuit should be given the opportunity to reconsider its decision, thereby rendering review by this Court unnecessary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

DOJ-1983-12